(16,881.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 301.

PETER LEE ATHERTON, PLAINTIFF IN ERROR,

vs.

MARY G. ATHERTON.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

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a Court of Appeals.

MARY G. ATHERTON, Respondent,
ag'st
PETER LEE ATHERTON, Appellant.

Papers on appeal from judgment.

W. & N. E. Kernan, attorneys for respondent, Utica, N. Y.

Seth C. Adams, attorney for appellant, Mann building, Utica, N. Y.

1 Supreme Court.

Supreme Court, Oneida County.

MARY G. ATHERTON, Respondent,
against
PETER LEE ATHERTON, Appellant.

Case and Exceptions.

This is an appeal from a judgment entered in the Oneida county clerk's office January 8, 1894, against the defendant, awarding to the plaintiff a separation, the custody of the child and alimony and money for the support of the child, with costs to the amount of $229.30, with an allowance of $1,000. The cause was tried at a special term, held at Utica, N. Y., June 12, 1893, by Mr. Justice McLennan. The complaint was verified January 11, 1893, and was served by publication, and the answer served April 10, 1893. Parties have not been changed, and are as above.

Mrs. MARY G. ATHERTON, the plaintiff, being sworn and examined by Mr. N. E. Kernan, testified as follows:

My maiden name was Mary Goodenow Kelsey; I was born in Clinton, Oneida county, New York; was married to the defendant, Peter Lee Atherton, at the same place, on October 17, 1888, in the Episcopal church; I then resided in Clinton with my father
2 and mother, sister and brother; was twenty-two years of age; the defendant resided in Louisville, and after the marriage to me, about the last of October or the first of November, I went with my husband to Louisville, Ky., where we took up our residence at the home of defendant's parents, Mr. and Mrs. John Atherton, the household being composed of my husband, myself, the servants and the father and mother of the defendant; my father was professor of natural history in Hamilton College, and has been dead two years; in January, 1889, I was in Louisville.

The plaintiff here being about to testify to certain unkind language used to her by her husband, Mr. Beardsley, of counsel for the defendant, objected upon the ground that such evidence was not competent under the opinion in Kennedy *vs.* Kennedy, 73 N. Y., 374, but the court held that he would hear all of the testimony in regard to the relation of the parties, their whole history.

The plaintiff then continuing, testified that at Louisville, in January, 1889, the defendant, without any provocation and without any reason, so far as I know, burst into a violent fit of passion; he said that I was a vain, unloving woman, that I was shamelessly heedless of all his wishes, that I was reckless, extravagant, and only married him to spend his money.

Counsel for defendant moved to strike out the preceding. This was denied, and defendant duly excepted.

The PLAINTIFF: This was in our room in Louisville; defendant's manner was that of a very excited, angry man; he walked up and down the room, brandishing his fist, snapping his fingers, and appeared to be extremely angry without any reason, almost beside himself with rage and anger.

3 The next occurrence was in the month of May, 1889, probably the first week in May, at our home in Louisville; I said to defendant that after having a discussion with his family physician, and talking with him about myself, that there was no doubt that I was in a family way; I also spoke at the same time of the promise which he had made me that I should return home to see my father and sister before they sailed for Europe; he paid no attention to what I said of myself, but immediately jumped at what I said about going away, and said that I was a false, unnatural wife, that I should have no desire to go from him, that I was unloving and not fit to be married, and if I went away I should never return; he was in bed at the time; he sprung from the bed to go to the secretary, in which there was a drawer, and took out a pistol and brandished it in my face and said, "This is loaded, this is loaded;" I was greatly frightened, and turned to run in my own room for safety; my husband's father at that moment came into the room and said, "Peter Lee, what the devil are you doing?" As I reached the door of my room, to which I was going in my fear, and had begun to cry, my husband called out, "I hope what is within you will perish;" I then went into my own room and spent the night in crying, and although I was greatly distressed, and although my husband could not help but hear in what distress of mind I was, he never came near me that night, and never retracted the speech that he had made, and never said that he was sorry that he had made that speech; there was a door between the two rooms; I was very much frightened when he brandished the pistol, and walked to and fro, and thought he would kill either himself or me, and tried to take refuge in the other room, and as his father entered he again called after me, "I hope that which is within you will perish;" he kept the pistol after that always at hand, and it was always

4 loaded; in the same month of May, in our own room, and also in the presence of his mother, in his mother's room, my husband spoke to me about his mother having intercepted a letter; he said in our own room that his mother had intercepted a letter which my mother had written to me; that the letter contained vile advice, and that my mother was a vile woman; he said that this letter would disgrace my mother before the whole community, and

hat it would be published in order that my mother might be shamed, and that I might be shamed; the second time that he repeated it in his mother's room he repeated the same thing; the letter was spoken of afterwards at other times, also in my sister's presence; I have never seen the letter.

Q. What effect did that have upon you?

A. I was very much distressed about it, and cried most bitterly; I was overcome by his unkindness; some time after that I came home to Clinton, the last of May, and was there until July; in July I had a fall; I had received an unkind letter from my husband, and had slipped on the stair, was very badly hurt, and in my condition it was a very apprehensive sort of thing to happen; I was ordered by the physician, Dr. Barrows, to stay in bed for a week or more; my husband was telegraphed for by the family, came to the house, and was there for two or three days; he had hardly reached the house when he began again to be very angry with me, and spoke most unkindly and harshly to me; he again brought up the matter of the letter, and said that my father tried to insult him, that my mother was no lady, and that there was a conspiracy in the family to insult him; his manner was extravagant, excited, and angry as usual.

Q. What was his manner at that time as to his hands and position?

A. Whenever he burst into these passions he always walked up and down the room, brandishing his fists and snapping his fingers, and had the appearance of a man who was entirely uncontrolled.

Q. What did he say, if anything, as to why he came to Clinton?

A. He said nothing to me of my condition, or my appearance or fears; he said he had only come to the house for the looks of the thing; he otherwise would not have come.

Q. Did he ask you anything in regard to your fall or about your condition?

A. No, sir; he displayed no anxiety about it whatever. After staying two or three days he went away to his mother's in Saratoga; he came back to Clinton in August, and spent that month there with me; almost immediately as soon as he came he began again these attacks upon me, and this time an attack upon my family; he said my family was vile and nasty, and called my father the following names: he said he was a dead beat, a low-lived cur, a will-breaker, a dirty, lazy slouch, and that I was like him in all these things; he also said at this time that while he and his father were in Colorado that they had remade their wills, cutting me off from every penny of their property; that he would be glad to see me poverty-stricken and penniless, and that eventually he would divorce me; that he did not love me, and I did not love him; that he would wait until the baby was born, and then he would divorce me; at that time my father, mother, sister, and brother were in the house, but they did not know it; my brother was twelve or thirteen years old; I was still in bed, and had not been allowed to get up when these attacks began, and I was very much prostrated by what he said; I felt very much hurt and grieved that he should say such

things about my family, and that he should make such an
6 attack upon me, and that he should say that he would divorce me without any reason; I cried very much; when I cried and begged him not to speak so to me, he said I was only making it up, that I was lying to him, and that it was only bosh. When he had these talks and said these things he always spoke in a very loud tone of voice so that every one in the house could hear him, and his manner was that of a man almost beside himself with anger; he marched up and down the room and snapped his fingers and shook his fists, and oftentimes I was very much afraid that he would strike me, he brandished his fist so near my face.

Q. What was the appearance of his face?

A. He was pale with rage a good many of the times.

Q. During this time you were in bed?

A. Yes, sir; I was still in bed.

Q. Were you at times afraid?

A. Oh, I was very much afraid of him.

Q. Would he come close to the bed?

A. Yes, sir; he would come close to the bed and brandished his fist so near my face that he just escaped striking me once or twice. It was in September, 1889, that my father and sister returned from Europe; I was then able to go out of the house, and went one day to church; my husband had reproached me with being careless of his gifts, and I had locked them up; when I returned from church I forgot to open the door; my husband shook the door, and I went as quickly as possible and opened it; as he burst into the room he said, "Don't you dare to lock the door against me again;" then he continued, saying that I was a shameful woman, low and mean, and bad as a nigger, and worse than any nigger in the streets.

Q. What effect did this have upon you?

A. Oh, I was very much overcome by his unkindness.
7 There was no reason for it; it was simply carelessness on my part that I had not opened the door; it was not meant as any insult to him, or any attempt to keep him from the room, and when I cried he said, as usual, that I was only putting it on, but I had no reason for putting it on.

Q. What was his appearance?

A. His appearance was that of great anger, loud voice and tone.

In September, when he asked me to do so, I returned with him to Louisville, leaving Clinton September 27th or 28th; I remained in Louisville until October 25th; my husband was only there about two weeks; then I asked his permission to return home, and it was given me, and I came home to my mother and stayed in Clinton with her until after the birth of my child; my husband met me in Utica, and was in Clinton for a short time; nothing happened at that time; I remained in Clinton until the 15th of March; the child was born on the 8th of January, 1890; my husband came to Clinton about the 2nd or 3rd of January, and was there until afterwards; the night on which he came he became very angry with me because we had been given a smaller room; he had come unexpectedly, and there were also unexpected guests in the house; he had come a little

in advance, a day or more in advance of the time that he had set, and because for that night only we were put in this smaller room he became very angry; he said that I did not love him, or I would have arranged a better place for him; that the smaller room was meant as an insult to him; and that I was an unloving wife; he continued to talk all through the night, reproaching me over and over again with having this smaller room, and repeated that I did not love him; he said also that he would divorce me; he had threatened me on almost every occasion; I was so overcome
8 and excited by this language that I was afraid that we would be overheard by my aunt, who was occupying a room on the same floor, and when I told him that, he said she was only there for a spy, purposely to hear him; I cried so hard that night, and was disturbed so much, that very great pain was brought on, and I was very much afraid my child would be born prematurely; I told him of these pains; at first he paid no attention, but after a while they were so severe that he became alarmed, and a physician had to be sent for, and then his attacks and disagreeable talk and scolding stopped; he said that I was both unwomanly, impure and immodest, because the two young lads who are brothers of my sister's husband were in the house for one day and two nights; I saw nothing of them; during the day they were taken from the house that I might have my usual exercise, but the fact that they were in the house seemed to make my husband perfectly furious; he said, "Your being in a smaller room is an insult to me; your family are always conspiring to insult me; you are unwomanly, impure and immodest with these young men here in the house; these young lads in the house;" they were only in the house one day and two nights, that is all; they did not interfere with me in my exercise or comfort; we only remained in this room the one night, and immediately after that two large connecting rooms were prepared for my husband and myself; the child was born on the 8th of January, 1890, there being present a trained nurse from the New York city training school, Mrs. Judge Neary, of Gouverneur; the child was born on Wednesday afternoon.

Q. Immediately after, or soon after your confinement and the child was born, will you please state what you remember in regard to any occurrence with your husband?

A. My child was born on Wednesday afternoon; on Sat-
9 urday night my husband, after dinner, came into the room and said, "I am going to stay here all night;" I said to him, "Peter Lee, I don't think it will be comfortable for you," and I said, "There are things which it is necessary for my nurse to do for me which you cannot do, even if you should want to, and your rest would be disturbed by the necessary functions that are performed for me." Then he become very angry and said he would stay anyway; he said, "I will stay here; you ought to want me, and I can do more for you than the nurse can, or just as much, and you are an unloving wife, or else you would prefer me to a hireling," and he insisted upon staying, and he stayed; he stayed until 4 o'clock; during that time it was not possible for my nurse to come into the room, she then being an un

married woman; finally toward morning I was in such a state of discomfort and distress that I was obliged to send for the nurse, and asked my husband to go out of the room, and he went out in great anger, and slammed the door behind him.

Q. What was his manner when he insisted on staying in the room all night?

A. It was that of anger, and all through the night, upon one occasion or another, he scolded and grumbled so that during that night I got no sleep at all; he said among other things that I ought to be ashamed of myself not to want him there; that I ought to prefer him to anybody else, and he kept up this scolding and grumbling so that the next morning, as my nurse knows, I was completely exhausted and overcome from the loss of sleep. As he got into the bed he complained of the condition in which I was.

Q. Were you bandaged?

A. I was, of necessity; he said Southern women were not
10 done up like mummies, as I was, and he wished I could take my bandages off, and he said also that I smelled very unpleasantly.

Q. Did the nurse come in toward morning with the infant?

A. She came in once during the night, and she could do nothing for me because he was there.

Q. Well, when did she come in?

A. She came in about four o'clock; I was obliged to call her, and was obliged to tell my husband that he must go away; I was in such a state of discomfort from lack of attention that he must go away.

Q. Did this talk and his manner tend to keep you awake?

A. Yes, sir; I did not sleep at all that night; I was very much distressed at what he said; his constantly accusing me of not loving him when I did love him dearly; and the next morning—I had cried so hard during the night that the next morning I was completely exhausted, so I could not raise my head from the pillow.

Q. Did the nurse say anything to him in regard to the necessity of your being kept quiet at such a time?

A. She had several times spoken to him; he said it was none of her business; that he knew more about me than she did; she was afraid to answer him.

My nurse said to him in my presence that absolute quiet was necessary for my recovery, that if these attacks of passion were continued it would be prejudicial both to me and to his child; he said that he knew more than the nurse.

Q. What else did he say in regard to his saying what he pleased?

A. He said that he would stay where he damn please, and he would say what he damn please.

Q. What was his manner at this time?

11 A. It was that of an angry man.

Q. His voice?

A. His voice was rough, and he showed great uncontrolled anger.

The nurse was obliged to come about half past four to attend me, and I had to ask my husband to leave the room, and he did so; I

had not slept any that night; he had talked continually, and when he was not talking I was crying, and was so distressed that sleep was impossible; I was not able to sleep; the baby was at times kept in an adjoining room, or was placed on a bed or cot in the same room with me; he said because the baby was not in the bed that I was an unloving mother, and an unnatural mother, too lazy to take care of the child; that even the beasts of the field loved their young more than I loved my baby; that was before that when the baby was only two days old; I was very much distressed by this unkind expression, cried very much, and was very much exhausted, so that I was not able to eat or sleep or recover as otherwise I should have; the baby was placed in the other room for its comfort and good; towards the last of January, about the 24th or 26th, I had a chill; this was after a conversation with the defendant in regard to an operation that might have to be performed on me.

Q. Will you give that conversation between yourself and your husband in regard to the operation that might have to be performed upon you? When was that?

A. It was the last of January, 1890, I think about the 25th or 26th; my husband and I had been talking about the necessity of the operation; I said to him that it would probably not be necessary; he said to me, "You must have this operation performed in Louisville; there are good doctors there; you must come to Louisville and have it done." I said to him that I would greatly
12 prefer to have the operation performed in New York by an old friend of the family, Dr. Fordyce Barker.

When I said this he became greatly enraged, and said I was a false woman and unnatural as a wife, and must do as he said; I was greatly distressed and cried, and when I cried he said, as usual, that I was only making it up, that I did not feel badly, that I should have the operation performed where he chose; he said, "If you go to New York and have it done, you will do it on your own hook; I will divorce you; you may as well begin to go on your own hook now, for you will have to sooner or later." I was greatly overcome by this—greatly distressed by it; this talk occurred after dinner. During the night, about midnight, perhaps, I became very cold, and my nurse was obliged to be called in, and I had this chill, which lasted for over four hours, and was very prejudicial to my recovery, and very ominous as portending something else, and also had a very high fever at this time; it was also discovered at that time that unknown to the nurse my husband had turned off all the heat in the room, and the nurse had no way of knowing that he had done this.

Q. Give whatever further was said or done in regard to that.

A. He left my room; I don't understand what part you want.

At the time this conversation occurred I was still in bed—had not sat up at all; his manner showed more anger than he had before displayed; he seemed almost insane with rage, and I was very much afraid that he would do me bodily harm because he became so angry; he shook his fist in my face, walked up and down close to the bed, shook his fist over me; he left my room about eleven

o'clock; his tone of voice was very angry, loud, and disagreeable; this was after dinner; he stayed in my room until between
13 ten and eleven o'clock, talking and gesticulating all this time, and walking up and down; we have dinner at night at six o'clock; this was after dinner; I did not sleep at all; about midnight the chill began, which lasted four hours; there was a recurrence of the chill the next night; there had to be a physician called in, Dr. Peck, of Clinton; I was nursing the child at the time, and the effect upon her was very bad, and although she was not very sick immediately, in a little while, through this chill, she became quite sick; was quite seriously ill while my husband was away in Kentucky; then, on the 28th of January, this same subject was all gone over again in about the same way.

Q. What took place on the 28th of January?

A. My husband brought up the subject; he went over the same ground; he said, "You shall have this operation performed where I say; if you go to New York you shall do it on your own hook;" he called me an unloving and unnatural wife, and false as a woman.

I was greatly distressed by what he said, and begged him to stop, and when he would not stop I pleaded with him for the sake of his child; he said he did not care about the child; he said, "I shall be glad to have the child taken from you as soon as it can be done; I don't care if your fever does make the baby sick; I shall be glad of it; the less the baby has to do with you the better I shall like it;" I told him that I wanted Dr. Fordyce Barker, an old family friend of my father's, a surgeon of world-wide reputation, to perform the operation, if any was necessary, which was not at all sure; on the 28th of January, the conversation was late in the afternoon; I was still in bed; had not yet sat up.

Q. What was his manner and tone of voice?

A. It was that of great anger toward me, and dislike toward me; he showed great personal dislike toward me; he talked so
14 loud that everybody in the house heard him—tramped up and down the room so that he shook the ceiling down below, and everybody could hear him in the house.

On these occasions he always shook his fists and snapped his fingers; he did so on this occasion—shook his fists in my face; I was very much afraid of him; I was terrified, and cried so loud that it became necessary for some one to come in, and so my father and mother came in; I had a chill the day before, and was weaker than I had been at all; I was completely prostrated by what had been going on, and unable to cope with his anger; I was still in bed; my father and mother both came to the room, and my father asked him in a tone of great kindness if he would not stop; he said he would not—he would talk to his wife whenever he damned please, and as he damned pleased; he said that with great anger; my mother came in, and he turned on her and said, "You go out; you shall not come in here; I won't have it;" my mother did not go out because I was so frightened; my husband left the next morning; he said that he would not stay in the house another minute, but my father persuaded him to stay that night, but he left for Louisville

the next morning; when he left he showed great indifference to me, did not bid me good-bye and expressed no shame or mortification or contrition for having put me in such condition; he never made any apology; he did not come back to Clinton; the child was at that time twenty days old; I went to Louisville on the 15th of March, 1890, and accompanied by my sister and nurse; my husband had left Clinton on the 29th of January, and did not return; my sister accompanied me — Louisville at the invitation of my husband and his mother; my sister was at that time 20 years old, four years younger than myself; my husband met us on that occasion in Cincinnati; he showed no affection for me, or no glad welcome
15 to my coming back—seemed only glad to see the baby; he took the baby immediately from my arms, and kept her most of the time until we reached home; we went directly from Cincinnati to Louisville; don't think he kissed me at that time; he showed no affection whatsoever; after I had been in Louisville some days, or a few days, my sister and myself were going upstairs; my husband followed us; he said to me, "I want to speak to you; I want to speak to you about money matters, and I want your sister to hear;" my sister replied, "I don't wish to hear your private matters;" my husband followed us upstairs; he said to me that I had been recklessly extravagant, and that I had been taking his money to send home to my nasty family; that he would publish me in all the shops, that he would not allow this sort of thing to go on any longer; then my sister, myself, and my husband went into my sister's room; I was obliged in a little while to go and attend to my child, and my husband and sister stayed in sister's room and talked; while I was in there my husband said that my sister was no lady, and if she had any self-respect she would not stay in the house, and if she were a man instead of a woman, or, in his exact words, he said, "If you were Brother Kelsey instead of Sister Kelsey, I would throw you out of the third-story window;" then I was obliged to attend to my child; my sister said to him that she would not think that he would speak so to me; my husband said that he would talk to his wife as he pleased and whenever he pleased; then I went into my own room to attend to my baby, and was joined in a short time by my sister; a short time after that my husband and his father both came into the room; then Mr. John Atherton, my husband's father, began to speak to me in a very loud, disagreeable way; he said he was very much shocked and distressed by what his son
16 had told him; I said, "I will not wrangle over the cradle of my sleeping baby;" she was then sleeping in that room; I went toward another part of the room; Mr. John Atherton and the defendant interposed between me and my sister and tried to prevent my sister from coming into the room; John Atherton turned to my sister and said, "We are to talk on subjects which are not fit for an unmarried woman to hear; I have come up here to be a witness for my son and to hear what is said;" my sister said to me, "Shall I come into the room?" and I said, "Yes, I haven't anybody here but you," and I said to John Atherton that if private matters were to be talked of they must be discussed between my husband — my-

self, and not before him, and that he had no right to be there; my husband made no objection to what his father said; the father said, "We are going to take the baby away from you; you are not a fit woman to have her; you are a dirty creature; we will turn you a disgraced woman into the streets;" he said, "I am surprised at what you have said to my son; in fact, you have accused my son of nothing more or less than incest;" I said to him that I did not understand what he meant, and he said, "Anyway, you are a dirty creature; you are not fit to have the care of the child; we will turn you a disgraced woman into the street, and you shall not have the child; we can and we will take your child away from you; we can do it, and we will do it;" he also made the remark then, and said that he could buy any judge off the bench that he chose; that it would be useless for me to do anything anyway, because he could manage all any way he liked; I told him that I could not listen to it any longer; that it was not true what he said about my care of the baby, and I started to leave the room; as I left the room my husband came after me and seized me very roughly by my arm and shoulder, and dragged me roughly back into the room, so that I almost stumbled; he then said to me,
17 "Damn you, you shall stay—you shall listen;" then John Atherton and Peter Lee Atherton repeated what they said before, that they would turn me a disgraced woman into the street; that I was not fit to have the child, and they would take the child away from me; I was very much frightened by what they said, and began to cry very hard, and in a little while the two men went away; after they had gone I went into my sister's room, and was in a very hysterical state, and quite beside myself with grief, because I had never been talked to so before, and I supposed these men could do what they said they could—take this child away.

Q. Were you at the child's cradle there?

A. Yes, sir; I went right to her because she was all there was that was a comfort to me.

At the time that my husband said to my sister that if she was Brother Kelsey instead of Sister Kelsey he would throw her out of the window, he was very angry, and was sitting on the trunk and banging his heels against the trunk; his tone of voice was very loud, angry and harsh, but don't remember any gesticulations; afterwards, when I tried to leave the room, my husband seized me very roughly, and I thought he was going to do me bodily injury because he did seize me so roughly; I was very much afraid of him, and where he seized me my shoulder and arm were bruised; the bruise remained for a day or so; there were marks where he took hold of my shoulder—marks of his fingers; I went into hysterics, but before that time my sister had telegraphed for my father; during this conversation I had said we were two defenseless girls alone there with two men, and if they insisted upon talking it all out I begged them both to let me send for my father, and they refused; they said we were powerless, and they could do just as they
18 chose with us; Mr. John Atherton was fully as angry as his son; he did not gesticulate to quite such an extent, but his

voice was loud and angry, and his manner was extremely rough towards both of us; he said to my sister during the conversation, "I will serve a summons on you and turn you into the street; neither of you shall spend another night under this roof;" my husband made no objection to any of this language; the second conversation when the father and son came up there and talked in this way to my sister and myself must have been for three or four hours—three hours, certainly; my condition when that conversation was over was hysterical; a physician was sent for; that night I went into hysterics, and almost into convulsions; they were very much afraid that I would; that condition remained almost all night.

Q. During what time of the day was this conversation?

A. This was partly in the morning and partly in the afternoon.

Q. The conversation where the husband and his father came up, when was that?

A. That was in the afternoon.

Q. You cried and had hysterics?

A. I had them two or three times.

That continued during the night; I was in such distress of mind, and so weak from my crying so long, that I almost had convulsions, and they were obliged to give me morphine; I suppose they did; I don't know what it was; the physician was sent for the next morning, Dr. Munroe; I did nurse my baby that night; she was very sick the next day, and it was both on her account and on my own that the doctor was sent for; I was in bed, or on the bed, the greater part of the next two days; my father was sent for; he did not
19 come at that time, but he did come afterwards; when my husband learned that my father was in the house he came to me and said, "It rests with you what reception is given your father; if you wish it to be peace tell him that everything is comfortable and everything is passed over;" I said to him, "That is the way I want it to be; that is the way I have always wanted it to be;" my father came and dined with us, and apparently everything was peaceful; later in the evening, while we were at dinner, loud voices were heard in the music-room; Mr. John Atherton came to the door and called to my husband, saying, "Peter Lee, come here;" his voice was very loud and angry, and I was greatly mortified; we entered the room, myself and father and Mr. Peter Lee Atherton; Mr. John Atherton said, "Peter Lee, Kelsey has said that you treated your wife like a brute when she was in a family way;" then he turned to me and said, "Was your husband unkind to you?" I said, "My husband was very unkind to me;" then he said, "Kelsey, you are a stinking liar," and when he said that my husband sprang at my father, old, feeble, gray-haired man that he was, and seized him by the wrists and tried his best to knock him down; I was very much mortified and ashamed for my husband, if the truth must be known, and I went to my husband and I said, "Laddie," as I always called him, "don't forget that he is my father;" then my husband dropped his hold; Mr. John Atherton then asked me the direct question, "Do you wish to *leave* in peace with your husband?" I said, "That is the greatest desire of my life;" "then," he said, "I think

the matter had better stop here," and Mr. John Atherton and Mr. Peter Lee Atherton left the room, and I asked my father to leave the matter where it was; my father went away and returned
20 home; in the following month of April, while I was still nursing my child, my husband came into my room one day and said, without any preliminaries, sitting down, "You are a nasty, dirty creature; you are a nasty nigger and a dirty slouch; you are not fit to be looked at; you are not respectable; I would not touch you for anything, and you are dirtier than any nigger;" I then said to him that while I was doing what I was for the child it was impossible for me to look as trim as I did at other times, but that I was always daintily clean; what he said made me feel very badly, that my husband should call me such names; I was very much distressed at what he said, and cried; it was not true; I was dainty in my person; I was dressed more loosely than at other times—lightly dressed; there was no reason for my husband calling me those names; a short time after that I was sick, and my husband came into my room without knocking, and he was not pleased with the state of things, and said to me, "You are a dirty, nasty cat, dropping offal around the room; you are a disreputable, dirty creature;" I tried to explain to him as well as I could that anything that was not pleasant in the room was to be removed by the servant, and he said, "Oh, you are always lying;" his manner was that of great disgust and great anger; his voice was loud and angry and uncontrolled; I was sick anyway, and depleted by the nature of the disease, and this thing coming on top of it was very bad for me, and I was sick in bed, and a physician had to be called and was called at regular intervals at that time; I explained to him that it was necessary on account of the amount of nourishment which I had for the child that I should dress loosely, that I could not wear dresses as I usually did, and said to him at that time that most fathers and husbands would have been proud of me instead of twitting
21 me of my nasty condition; my sister remained there for some time after that, and went south with my husband for a pleasure trip at his invitation; when my sister left Louisville for home, about the last of April or the first week in May, myself and husband went to the station with her; while there my sister said in my hearing to my husband, "I hope you will be good to Mary;" he became very angry and said to her, "You are a hypocrite; you are pretending of being fond of me, and you pretend that in the place of my wife;" he would not shake hands with her; I was naturally crying at her departure, and my sister was crying at parting from me; we stood at the steps of the station; my husband took my hand and pushed me roughly towards the train, and he said, "You may as well go, too; nobody wants you here;" I said to him, "You know who is at the house," meaning the little daughter; he said, "If that is the only tie there is you may as well go; nobody wants you here, and I will divorce you sooner or later;" I was very much frightened by what he said and by these continued threats of divorce, because I was not conscious of giving him any reason to feel so towards me. When the baby was sick, in May, 1890, my husband reproached me for looking

glum; he said, "You ought not to look the way you do; you are very disagreeable to look at; that in spite of the baby, or whatever is the matter with her, you ought always to look pleasant, and it is very disagreeable to have you around the house, and I wish you were not here;" his manner was angry, and he spoke in an angry way; his manner towards me was that of great anger; this made me very unhappy and miserable; in May or June of this year, on one occasion when the defendant had been reproaching me of being unloving and indecent and nasty, I said to him, "I don't see why you should belittle me—I am your property," and he said
22 to me that he felt like Cox or Breckenridge, I don't remember which it was, "that things had come to a pretty pass when a man couldn't wallop his own jackass;" his manner was not jococe, but angry, and this speech came after a long tirade; he was apparently angry; my husband had promised that I should go to my sister's wedding, which was to occur the last of July, 1890, but when the matter was brought up he said that I should not go home; that if I went I should not take the baby with me; that if I left him I should never take the baby to the house of people who had insulted him as my family had insulted him by objecting to his treatment of me when the child was born; the weather of Louisville became very hot, and the child was ill, and I was obliged to take her to Cresson, where my husband's mother was when we reached there; while there the father of Mrs. John Atherton died, and she left Cresson; after they were gone word was sent to me that my mother was dangerously ill; she was very delicate, and I telegraphed my husband that I must go home, and he made no objection to my going, so I went home, and was there when my sister was married, and a short time afterwards; while at Cresson, Pennsylvania, his manner became very angry and more loud and outrageous in his talk than before; he said that I was a false, unloving wife; that I was shameful; that he would divorce me; did not love me, and I did not love him, and he talked very loud and insultingly; when I asked why he would divorce me he said that I was an indecent woman, a dirty nigger, and he didn't want to have anything to do with me; he talked very loud, and I was very much humiliated because he talked and gesticulated and rowed before other people; he didn't care where he was; I was very much mortified by his talking this way before some of my friends, who
23 saw and noticed it; I came home during the month of July, and returned to Louisville September, 1890; I went back when my husband asked me to come; my husband met me in New York; I was afraid to meet him alone, he had treated me so; I was afraid of him; my aunt went down to New York with me, and while my aunt was there he treated me more civilly, but no sooner had my aunt gone than he dismissed this trusty nurse and he began an attack on me, saying I was a lazy, bad mother, not willing to take care of my child myself; that I only wanted a nurse for that, that I should not have the nurse, and should make the journey alone, and he dismissed the nurse, and I had to make that long, hard journey without any one to help me at all; I was much fatigued

and exhausted by it; I was in New York at this time four or five days only; these conversations were in my room; the conversation in which he said I was not his wife, but his mistress, did not occur at this time; he said that to me three separate times—the first during the month of December, 1890; he said it then in perfectly cold blood; he said I was not his wife, but only his mistress; that I was like a common woman in the street, was an indecent woman; this was in perfectly cold blood, in my room at Louisville, in December, 1890; the next occasion, as near as I can remember it, was during the month of January, 1891; he said to me then that he had never asked me to marry him, that I had run after him and got him to marry me, that I was not his wife, that I was only a common woman in the streets, was as dirty as a nigger, and worse than any nigger; that nigger women knew better how to prepare their beds and make themselves attractive than I did; that they were much better dressed and more agreeable than I was; he was not
24 angry when he said that; he said that intending to humiliate me; once later, in another conversation, he said the same thing, saying for the third time that I was not his wife, only his mistress; that was all he cared for me at all; I was very much distressed by what he said; on one occasion after that I was so very ill that he was obliged to call a physician, Dr. Monroe; on several occasions that winter after these exhibitions of rage I was so exhausted that I was unable to get out of bed; at the time Dr. Munroe was called I was sick about two days; that was at the January conversation, 1891; my father died in March, 1891; I came to Clinton at that time; I was in the South with my husband, and we came North; we did not reach Clinton until after my father died, but I was there afterwards; I returned to Louisville during the first week in May; my mother was very ill during the time I was at Clinton, having pneumonia for the second time, being very dangerously ill; I stayed in Clinton until my husband asked me to come home, although my mother had not been out of bed, was still in bed, but I was anxious to please him, and so went; during the month of May, 1891, my husband called me down into his father's room, and ordered me to listen, and said, "I am going to divorce you; I don't want anything more of you; you have got to get out of this house, but I am going to keep your child; I want my child, she belongs to me, I want her, and I will have her;" his father was present; he said, "If you were my wife I would file a plea for divorce before noon today;" his father also said, "We will take the baby away from you whenever we choose;" I said I don't think you can take my child from me; he said, in a very sneering way, "Well, you had better consult a lawyer, and you will find that the father's claim is the one that stands highest; you will find that we can take the child away from you, and we
25 will take her away, and you shall not have her any more," and then Mr. John Atherton said to me if I did not think so, I had better consult a lawyer, in a very sneering way; I said to him I did not think he could; I was very much frightened, and went to an old family friend, hoping that he would be able to

smooth the matter over; my husband made no objection to anything his father said, and he also at that time said that he would divorce me, and would be glad to divorce me, and would make arrangements for a divorce that summer; at that time I said to him if he was going to do that, I begged him not to do so, but if he was going to do it to do it then, and not have it hanging over me all summer while I was away, that it was torturing me; my husband said that he liked to torture me that I was a dirty creature, an indecent woman, and deserved to be tortured as much as any man could do it; there was more than one conversation of this character—one in May and another before I left in June; defendant's manner was very angry; he stormed about the room, and I was very much frightened between the two men, because they both seemed determined to cow me and bully me; their manner was harsh, and their voices and actions very rough; only the three were present; my husband said he could take the child away, and he would do it, and that was what he wanted; he had had all he wanted of me; Mr. John Atherton was angry, but he did not speak in so loud a tone; he sneered rather than shouted; I think this all occurred in June; my husband told me that he would give me one day to decide whether I would get out quietly and leave the baby, or whether we should take the matter to the courts then and there; that was late in May or the first of June at the time this conversation was had;

26 when my husband spoke of beginning proceedings for divorce, I asked him to begin them then, that I need not have them hanging over my head all summer; he said that he would torture me as much as he could; when he went away I went to him and said to him—he was going to Chicago—to let us part in friendliness, anyway, as we were to be separated all summer; he threw my hands away from him and said, "Oh, none of that bosh," and went away in anger; I came to Clinton in June, 1891, about the middle; my husband went to Chicago before I left Louisville; he went away almost immediately after this talk; he said on the afternoon of the first conversation that he would give me a day to decide whether I would clear out quietly and leave the baby there, or whether we should take the matter to the courts; that night there was no more discussion; the next morning I went to him, planning to say to him that I could not be parted from my child; before the beginning of this conversation he said to me that he had made up his mind that I could go home; he said, "You never have lied to me, and if you will promise me that you will come back in September with the baby I will let you go," and I gave him the promise, and when September came I did go back, returned to Louisville in the first or second week in the month of September, I do not remember exactly; my husband did not go to Clinton for me; I came by myself, with the child and nurse; early in October, 1891, my husband came into my room one day, and the child was being fed; he went up to where the baby was sitting and poked his fingers in the food and said, "This is not fit for a pig to eat;" he said, "You don't know anything about taking care of the child; you don't take care of her properly, and this food is not fit for

a pig to eat;" his manner was very loud and angry toward me and the child; at this time, in September, he came
27 to me and said, "I am going to cut your allowance down;" I said to him, "If you feel it necessary, of course, I will do the best I can, but I should think you would want me to dress according to your position;" he said, "I don't care a damn how you dress; you can wear your night-gown in the street, for all I care;" he said, "You have worked me through the baby; you have been spending my money on your family, pretending to get things for the baby, but that sort of thing has got to stop; my child shall be well dressed, and you may charge the things; I will pay bills for her, but you must get along the best you can, but you shall not make any bill; if you do, I will publish you in the shops;" I had not been spending any of his money on my family; they did not need it, and would not have accepted it; all the time that I was there defendant treated me with great rudeness, would not help me at the table; both he and his father talked business plans, and acted as though I was not there; I tried to speak to them, but they refused to speak to me; they tried to appear as though I was not there at all; on the 3d day of October, the day after the conversation that I have spoken of, my husband came upstairs and stood and talked to me by my dressing-room door; he said to me that I should not spend any of his money; he said that he would divorce me, that he did not love me, that I was a shameful, indecent woman, not fit to take care of the child, and he would take the child away from me; I said to him that he did not treat me with ordinary civility, and he said he treated me with as much civility as he did his other woman; I said to him, "With as much civility as you have your friend in Chicago;" he immediately said I had accused him of unfaithfulness; he said, "You are a foul-mouthed, vile-thoughted woman; you shall not have this child any longer;"
28 he seized the baby from my arms as I stood there, took her roughly; the baby began to scream; he took her roughly across the hall; I tried to reason with him; the little thing was screaming and crying terribly; I tried to take the child from his arms; he went into his room and I tried to follow him, and he took me by the arm and shoulder and pushed me from the room; he said, "You never shall see your child again;" the baby was screaming and crying so it was terrible to hear; I was outside in the hall, and it nearly took my breath away, because I thought it would make the baby sick; he had locked the door; after a time the baby cried so hard that he was afraid that it would make her sick, and finally he opened the door and let the nurse in; in five minutes or so, perhaps, he opened the door and let me go in; I took the child and put her to sleep, and at that same time he told me that he had made arrangements to take the child away, that this had lasted as long as it should, that he was going to take the child away and I should never have her again, and never see her again, and that he had made all arrangements to take her away; I stayed and put the baby to sleep; I was beside myself with terror; I thought he would do it, that he could do it, that he would take the baby away

and that I should never see her again; I went down to his mother's room and he came there in a few minutes; I thought she would help me because she was a woman; the defendant followed me down to the room; he made the statement before his mother that I was a vile creature, an indecent woman, vile-tongued, that he was going to take the child away, and said I was false—had been false to him; his mother said that she also had been accused of infidelity; his mother asked me if I believed that, and I said no, I did not believe that; that he would take the child away; I went to my husband and
29 tried to put my arms around his neck and ask his forgiveness for what I had said; asked his forgiveness because he was going to take the baby away, and he put my arms down from his neck and flung me away and said, "I would sooner touch a snake than touch you," and he flung me away so hard that I fell against the foot of his mother's bed, and I had a long bruise where I struck; his mother said to me, "Let him take the baby and go; you can't do anything; let him take the baby;" I had no help from her; she said that the baby should go, that the strongest one was there allowed to take the child away, and I had no one to help me, and was beside myself with fear to such an extent that I took my little girl in my arms and went to the house of a friend for refuge; during this time, when the defendant was in his mother's room, he seemed very angry toward me, and seemed determined to take the child away from me—exhibited great passion; he walked up and down his mother's room, and his face was red and his manner was angry and fierce; he looked almost like a wild animal, more like an animal than a man; when he had the child upstairs he pushed me away, and I was afraid he would kill me; he looked perfectly insane with rage and anger; I was very much afraid of him, was afraid that he would do me bodily injury; at the time when I went downstairs and saw Mrs. John Atherton, the mother of the defendant, my husband said to me when he came into the room—he turned to his mother and said, "Mary is a vile, foul-mouthed woman; she is not fit to have this child; she has accused me of unfaithfulness;" Mrs. John Atherton turned to me and said, "Mary, have you accused your husband of this? Do you believe he is unfaithful?" I said, "I don't believe it, and I take
30 back any charge that I made;" that was all that was said upon the subject; I went to my friend's house, Mrs. Belknap's, on Saturday; my husband came to see me there in the afternoon, about two o'clock; I went downstairs to see him, and without rising or taking off his hat he said to me, "Well, this is a pretty move; I will give you one more chance to be a decent woman; you go upstairs and get that child, and come down and get into that carriage and go home;" I said to him, "Peter Lee, I am afraid to go back; won't you give me some assurance that the scenes that have gone before won't be repeated?" He said, "Damn your assurance; I will give you one more chance, as I said before, to be a decent woman." He said, "You need not think you are going to gain anything by what you have done; you are an utterly helpless

woman; you cannot do anything; I can do just what I choose;" he said, "If you don't come back I will go and get the sheriff and have you dragged through the streets in disgrace;" and I said, "I am afraid to go back;" he left the house, and that is the last time I have ever seen him until now; I remained with my child at Mrs. Belknap's from Saturday noon until Tuesday morning, as near as I can remember; I was confined to my bed nearly all the time; I had cried so hard and felt so distressed that I was unfit to do anything; I could not eat nor sleep; was on the bed or in the bed most of that time; on the following Tuesday I was joined by my aunty and brother and went to the Galt house; by my brother I mean my brother-in-law, Mr. Evans, and also his wife, Mrs. Evans; I remained at the Galt house, I think, about ten days, and then returned to my mother at Clinton, and have lived with her since; that has been my residence since; my mother keeps house; has a lovely place, and everything is done for the child that can be done; the child has been there ever since; its name is Mary Valeria
31 Atherton; I went to my mother with the intention of making that my home; that has been my home, has been practically my home, and that was my intention at that time.

Cross-examination by Mr. BEARDSLEY:

I stayed with my husband three years less fourteen days; Mr. Kernan will remember when I first consulted him; I do not exactly remember when it was; I swore to the complaint on the 11th of January, 1893; I made the statements on which the complaint was drawn to Mr. Wm. Kernan; I suppose he drew it; I first met with the defendant in St. Augustine, Florida, in April, 1888; had never met him until that time; at that time I saw him between three weeks and a month; did not then know his condition of health; I next saw him the following June, when he came to Clinton, and next the following August, when he spent about three weeks in Clinton, and next when we were married in October; after the marriage we went to New York, remained there about a week and then went to Old Point Comfort, at the Hygeia, remaining there perhaps a month; while at Old Point Comfort my husband was very much out of health; I cannot give the date when I left Old Point Comfort; from Old Point Comfort I went to New York, where my aunt was very seriously ill; my mother was in New York; I remained there four days, and from there went to meet my husband at Charlottesville; my aunt is still living; from Charlottesville we went to Louisville, arriving at Louisville about the 1st of November.

When I got to Louisville, I lived at the house of my husband's father; Mr. John Atherton had only one child; from between
32 the time we got to Louisville and May, 1889, I attended very few parties or entertainments; my husband was too ill; I was not informed about May, 1889, that an analysis had been made indicating that my husband had symptoms of Bright's disease; I never received any such information; will say that Mr. John Atherton did not so inform me at any time; I do not remember when I did hear it, but think it was perhaps during the next summer; don't

remember when it was exactly; think, perhaps, it was in the summer of 1890; don't remember when it was.

Q. You heard of it at some time?

A. Yes, sir.

Q. It made so little impression on you that you can't remember the time?

A. Well, he was always threatened with something.

Q. Yes, undoubtedly. Will you answer my question and not be humorous on the stand?

The COURT: The question is whether or not it made an impression upon you to fix the time, such as would fix the date.

The WITNESS: No, sir; I don't think it did.

I went to Clinton in May, 1889; my father and sister were going abroad that season; I did not request my husband to take the furnished house of my father out there and occupy it during the summer; it was his own proposition; he did take the house and pay expenses during the month of August and part of September; he hired a phaeton for me to ride in; my father had two or three vehicles; I stayed at Clinton until some time during the month of September, and returned to Louisville with my husband; my husband was with me a part of that summer and took me out driving in the new phaeton; I don't recollect how often; part of the
33 time my mother and brother were at Clinton; my father and sister were abroad.

Q. Prior to your going to Clinton, in 1889, was it arranged between yourself and the defendant that the house at Clinton should be taken for the summer?

A. I don't remember.

Q. Think a moment.

A. I don't remember any conversation on the subject.

I don't remember that there was an understanding; there had been talk of such a plan; the result of that talk was that I understood he was to take the house for a portion of the summer of 1889; I have a few of my husband's letters, do not know how many; perhaps a dozen.

At the time of the birth of my child, Dr. Barrows was with me; he became sick and Dr. Peck was called, of Clinton; Dr. Ford, of Utica, was called in once; he did not have charge of me at all; he saw me there once or twice; defendant sent for him to come; I left Clinton for Louisville on the 15th of March, after the child was born in January; got there on the 16th of March; I remained there until the following June; then went to Cresson.

The witness identifies as in her handwriting the address upon the envelope, marked for identification "Ex. No. 1," and the letter enclosed, marked "Ex. No. 2;" and another letter, marked "Ex. No. 3;" another letter, marked "Ex. No. 4;" another, marked "Ex. No. 5;" another, marked "Ex. No. 6."

At the time the defendant, in 1889, was occupying the
34 house in Clinton, he bought a bed-room suit that was put in the room of my sister; my sister remained in Louisville about

a month, in 1890; she and the defendant had a trip to New Orleans, and Pass Christian in April; they did not go alone; they went with a party of friends, three or four probably; I don't remember; my sister went at the invitation of my husband; my husband made me an allowance of money, at one time sixty dollars a month; at first, seventy-five dollars a month; the first year this was deposited in bank and I drew checks on it; I kept a box in the safe-deposit company for taking care of my bonds; I had a key and I think my husband had one; in November, 1889, when I went back to Clinton, I took those bonds out and carried them with me; at that time, I had certain of my furniture boxed up and sent to Clinton—three pieces; my husband at that time was with his mother in Saratoga, where she was sick; when I went from Cresson to Clinton, in June, 1890, I remained there until some time in September, 1890; there was a suggestion, and more than a suggestion after 1889, by my husband that my father and mother had not treated him kindly, and he suggested on account of that, he was unwilling to go to Clinton himself; my father died March 30, 1891; on receiving at Tallahassee, the news of my father's illness, my husband helped me to get ready to go home, and he and I with the nurse and child went immediately to Louisville; my husband was much better than he had been, though not wholly well; he went on with me to Clinton, taking the child and nurse; he was there about a week or ten days; then he returned to Louisville; I returned to Louisville during the first two weeks in May; while my sister was in Louisville, a ladies' lunch was given for her; and from September, 1890, to February 14, 1891,
35 I went out a very little, not very much, with the defendant to entertainments of various kinds; by very little I mean, perhaps, once or twice — week, not more; in January, 1891, there was a large party given at the house of the defendant's father and mother; when I was in New Orleans, in 1891, I visited a dry-goods store kept by one Holmes, and there was three or four dresses bought for me; in the summer of 1891 I was at Clinton, going there in July and remaining there until some time in September; I hired a village cart for my own use while there; the defendant sent me the money to pay for it; at that time I was getting seventy-five dollars a month; I did not run up bills; my husband gave me some things; I do not think my allowance was continued after March, 1890; I think I went to the stores after March, 1890, and had things charged; there is a store in Louisville kept by Seashols & Co., and one by Augustus Sharp; I think it is very likely that between April, 1890, and December 30, 1890, I incurred bills at Sharp's to the amount of $418, and at Seashols' to the amount of $878, and bills at Seashols' from September 15, 1890, to the amount of $596.40; during that time I bought a white dress at a cost of $150; that was for that reception at the Athertons; a pink dress at $95, on December 19, 1890, and on December 30th another dress for $58; from January 17, 1891, to April 20th, I do not remember, but dare say I bought articles at Seashols' amounting to $164.20; I think that a greater part of these bills were dresses for my baby; on October 29, 1890, my husband gave me a sealskin cloak at a cost of $165.

Q. Now, during the time when these bills were being run up, did you get money from your husband?

A. Do you mean did I ask him for money?

Q. I don't ask you whether you asked for it; I mean, did you receive money from your husband?

36 A. I don't remember; I think it was about that time that he wished to pay the washing bill himself for fear that I would make something out of it; I don't think I got any money from my husband while these bills were running.

I think I got money from Frank Miller, who is a book-keeper at the Athertons, with my husband's consent; I don't remember how much it was.

Q. Was the interview to which you referred in your testimony on your direct examination, where you referred to Mr. John M. Atherton, March, 1890, in the forenoon or in the afternoon?

A. It covered both forenoon and afternoon; it began in the morning.

Q. At what hour?

A. Soon after breakfast, as nearly as I remember.

Q. How long did it continue?

A. Most of the day—most of the morning, certainly.

Q. How many hours?

A. I couldn't tell you exactly.

Q. What time did it commence in the afternoon?

A. I should think it was soon after lunch.

Q. What time is lunch?

A. About one o'clock, I think.

Q. How long did the afternoon interview continue?

A. I don't remember exactly.

Q. Who was present at that afternoon interview?

A. At different times different people; I had a talk with Mr. John Atherton by myself; afterwards we were all present; afterwards my sister, my husband, my husband's father and myself were all present.

Q. Was that in the afternoon or forenoon?

A. At both times. During the morning and during the afternoon we all four talked together.

37 Q. Whereabouts?

A. In different rooms; in my sister's room and in my husband's room.

In that interview in the morning Mr. J. M. Atherton said that he would turn me a disgraced woman into the street; he said he would serve a summons on my sister and also turn her out; he said he would put my child away from me, that I was not fit to take care of her; he said he was very much shocked and horrified at what my husband had told him that I had said to my husband; he ended that conversation by saying that, "You have accused your husband of nothing more nor less than incest;" he said that I was not fit to take care of the child, that he would take the child away from me.

Q. Who were the friends who composed the party when your sister and the defendant went to Pass Christian, New Orleans?

A. I really don't remember who they were.
Q. Do you remember any of them?
A. No; I don't think I do.
In regard to this interview of March, 1890, it commenced in my sister's room, on the fourth floor; at the commencement there were present my sister, myself and my husband; I don't think any one came into that room until the afternoon; we had a talk in that room in the afternoon; Mr. John Atherton did not come into that room then; in the afternoon of March —, 1890, the conversation took place in my sister's room; there were present at the afternoon conversation Mr. John Atherton, my husband, my sister and myself; it began some time soon after lunch.
My attorney at Louisville was Mr. E. J. McDermott; he is not present.

38 (Witness identifies "Exhibit No. 7," and proves that the name signed to that is in her genuine handwriting.)

Q. Can you give the reason for intimating or suggesting to him before you were in his mother's room that he was unchaste?
A. I had heard what the servants had said in the house.
Q. Wait a moment; I don't ask anything about the servants.

(Last question read by the stenographer.)

The COURT: State whether you can or not; whether you can give a reason.
A. Yes, sir.
Q. Give that reason.
A. The coachman who had gone with his horses to Chicago brought back word that both the father and son posed as unmarried men; that certain women of ill-repute had met them at this stable; that was all.
Q. And you believed that?
A. I didn't want to believe it.
Q. Did you believe it?
A. I did at the time.
Q. Did you ask your husband about it the next time you saw him?
A. I did not; I was ashamed to.
Q. Were you in the habit of talking to your servants about your husband?
A. I didn't talk with the servants on this occasion; I overheard what was said.
Q. You were listening?
A. I heard what was said.
Q. Where was that said?
39 A. It was said in the butler's pantry, if you want to know, it was off from the dining-room.
Q. When did you hear that?
A. Soon after I reached Louisville.
Q. When you were in his mother's room on that October 3d, did you then believe any such thing as that?

A. I think I did.
Q. Yet you told the mother that you did not?
A. I was anxious not to.
Q. Wait a moment; you told the mother that you did not, didn't you?
A. Yes, sir; I did.
Q. Are you in the habit of believing what you overhear servants say?
A. Not always; it depends upon the servants.
Q. Did you tell Mr. John M. Atherton what you heard?
A. No, sir.
Q. Did you tell Mrs. Atherton?
A. No, sir.
Q. Down in the room there what you had overheard the coachman say?
A. No, sir.
Q. In November and December, 1890, at Louisville, give me one conversation which occurred?
A. What my husband said to me?
Q. Yes.
A. January, 1891, there were three conversations which I gave yesterday.
Q. No, no; in November and December, 1890; I cannot fix the date any more than it is here; in November and December, 1890, at your home in Louisville?
A. My husband said to me, in perfectly cold blood, without any——
40 Q. Now, leave out "in perfectly cold blood."
A. He said to me, "You are no wife of mine; you are only a mistress; you are like a common woman or like a woman out of the street; you are as dirty as a nigger and worse than any nigger."
Q. Had you said anything preceding those remarks?
A. No, sir.
Q. Did he burst right out in that way?
A. He wasn't angry on that occasion.
Q. Well, did he burst out in that way?
A. Yes, sir.
Q. Did he say that you didn't love him?
A. Yes, sir.
Q. And therefore you were only his mistress, and no wife?
A. He didn't say it in that connection.
Q. But not at all in that connection?
A. He didn't say that I was his mistress, because I didn't love him; he twitted me with loving him too much, Mr. Beardsley.
Q. Wait a moment; did he say that you didn't love him, and was only his mistress and was no wife?
A. Yes, sir.
Q. And that he never asked you to marry him?
A. Yes, sir; that I had run after him.
Q. What else was said?

A. I think that was all at that time.
Q. Did anything precede that?
A. Not that I remember; no, sir.
Q. What took place in the month of June?
A. Do you refer to the conversation about my returning home?
Q. I refer to the conversation which you have alleged here in the complaint.

41 The COURT: Give her an intimation of what it is about.

By Mr. BEARDSLEY: You say that the defendant renewed his threats of getting a divorce?
A. He said to me, as he had said before, that he had no further use for me; that I had got to get out of the house.
Q. I don't want you to say "said before;" leave that out.
A. He said he had no further use for me; that he was going to divorce me; that he could do it whenever and wherever he chose; that he would take the child away from me, and that I should never have the child, and that I was not fit to have it.
When I left Louisville, October, 1891, I visited my aunt for a short time, and then came directly to Clinton; my aunt is named Miss Goodenow, and she has a country place outside of Boston, at Lancaster; I went from Lancaster to Clinton, and have been there since.
On April 23, 1890, I was sick, and my husband came into my room without knocking, and expressed much disgust at the state of the room, and he said to me, "You are a nasty cat, dropping offal around the room; you are a disgusting, dirty creature;" and he said he would have nothing to do with me, and I tried to explain to him at that time that the servant was coming in a moment to remove anything that was unpleasant in the room, and he said, "You are a liar, as you always are."

"Exhibit No. 2," identified by plaintiff and written to defendant, was read in evidence. Said exhibit is in words and figures as follows, to wit:

"APRIL 24, 1890.

"MY OWN DEAR LADDIE: Your welcome letter just came.
42 You poor dear, your vivid picture of yourself made me shiver. I know too well just how it felt. I was a bit under the weather yesterday, and so didn't write. Am well and comfy today, but missing you much. How we want each other when either is ill or miserable. Everything goes on here in the usual way. The dear daughter is bonnie and well. Eating and sleeping as she ought. Charley Sillen made his appearance here today, and we found him an ordinary-looking lad of about twenty singing in the chorus, and very modest about his company and prowess. Myra comes down tomorrow to meet him and stay a day or two. Mr. Craik came to call this morning in obedience to my request, and he is willing to have the christening May 4th at 10.30, if that suits you and me. I told him who the godmother and godfather were, and he seemed interested. Excuse the pencil, dearie; my pen

gave out. Mr. Barrett does not get back until May 3d, and I hope he won't fail. Father John said he would write to him. I got the flowers as you wished, and because I couldn't go myself sent my roses to Miss Watterson with your card and mine. Don't be alarmed. I only had a severe — what Jubbie calls a di-eration, and the day being bad I thought I would not risk anything. Em. is just dressing, and is going to look very pretty. She carries pink roses, as usual, and wears her brocade. Macauley sent some compliment tickets for tonight. He has invited the Louisville whist club to attend en masse, and I sent the tickets to Essie and her father. Nance going tomorrow with Father John and Ethel; it is the Mikado; I wish you could see babe—she is staring with all her eyes at those pink roses—she does notice so well; Mr. Craik quite raved over her and held her in a capable way funny to see; he has had practice in his christenings, I suppose; I wish I were with you, dear; (I
43 send you small pillow as my best substitute for my shoulder;)
I must give this to Em. to mail; write me every day, Laddie, please; little M. V. sends her love to her darling daddie, and big Em. sends her love to her own dear Laddie.

M."

In regard to the surgical operation, I said I would prefer to have it done by a physician in New York; the defendant did not say at any time that if it was found necessary to have the operation, and I would not consent to having it done in Louisville, that I might go to New York; he said it must be done in Louisville; no operation was performed.

Q. You stated that you preferred to have it done by a physician in New York?

A. Yes, sir.

Q. Naming him?

A. Dr. Fordyce Barker.

Q. "Who *who* was a friend to the family, a friend of the family, and whom she knew and trusted, and instead of any physician in Louisville who was a stranger to her." You say that thereupon he became very angry and abusive?

A. Yes, sir.

Q. Just on that statement?

A. Yes, sir.

Q. And he said you were unnatural as a wife?

A. Yes, sir; and false as a woman.

Q. And shamelessly heedless of all his wishes?

A. Yes, sir.

Q. That he walked up and down the room and shook his fists at you?

A. He did so.

Q. How near did he get to you when he shook his fists?
44 A. Right in my face; he just escaped hitting me.
Q. He just escaped hitting your nose?

A. I am not sure whether it was my nose or my face.

Q. Didn't you think that that was a very small cause for such a demonstration?

A. That is all the provocation that there ever was.

Q. When he was at Clinton, about January 2nd, 1890, what did he say about the room?

A. About the temperature of the room, do you mean?

Q. No, no; about the size of the room.

A. He said, because he was for the time being lodged in this small room, that it was an insult to him; that my family always pushed me to the wall; that his being put in this smaller room was intended as an insult; he also said that if I had loved him and cared for him I would have seen that a larger room was provided.

Q. Did he not say that he thought that the room was too small for you?

A. No, sir; he did not.

Q. Nothing of that kind?

A. No, sir.

Q. It was simply about himself?

A. It was simply about himself.

Q. Mrs. Atherton, have you in your recollection, any kind thing which the defendant ever did or said to you?

A. Yes, sir.

Q. You didn't get any of them in your complaint, did you?

A. No, sir.

Q. Coming down to May, 1889, when you were at Louisville, and about the 11th or 12th, you desired to visit your parents, did you not?

45 A. I did.

Q. And you expressed such desire to the defendant?

A. Yes, sir; I did.

Q. What occurred then?

A. He said that I should not have the child there; that I should not take the child away from him.

Q. Why did he say that you should not take the child there; this was in May, 1889?

A. Oh, this was 1889.

Q. Yes.

A. Oh, the child was not born then; before I went home myself he said that I was unloving toward him to want to go; he said that if I cared for him I would not go; he said that I was a shameful, unnatural, unloving wife, and that I was false, and it was at that time that he paid no attention to what I had told him of my condition.

Q. Now leave that out.

A. I had told him of my condition then.

Q. Go on and state what took place and what was said.

A. He sprang out of bed in his great anger and went to his secretary and took from the drawer this loaded pistol.

Q. Was he in bed then?

A. Yes, sir; this conversation took place after dinner, after the late dinner.

Q. At what time?
A. I don't exactly remember.
Q. Before tea time?
A. After the late dinner in the evening; my husband had gone to bed.
Q. What did he do?
A. He went to the drawer of his secretary and took out this pistol and brandished it near my face, and shook it around,
46 and he said, "This is loaded, this is loaded;" I was very much afraid that he would do me some bodily harm.
Q. Just confine yourself to what he did.
A. I turned to go into my room and he called after me, "I hope that that which is within you will die," meaning my unborn child.
Q. He said he meant your unborn child?
A. He didn't say that; no, sir.
Q. Did you in your complaint put in what you last stated: that he wished that that which was within you was dead, or something to that effect?
A. No, sir; "would die" was the expression.
Q. Did you put that in your complaint?
A. No, sir.
Q. Prior to that time, and about the 11th or 12th of May, was anything said between you and him about having the home there at Clinton?
A. I have answered that question.
Q. Will you please answer it again?
A. There had been no agreement made; there may have been a conversation.
Q. Didn't you understand on the 11th or 12th of May that you were to go to Clinton for that summer?
A. Not until after this talk; there was no understanding that I was to go.
Q. None until after that talk?
A. Yes, sir; he had said—there had been a talk of my going, and then he forbade me to go, and eventually he withdrew his objection and I did go.
Q. When was that "eventually withdrew" as to this conversation and this pistol business?
A. The objection to my going home?
Q. Yes.
47 A. Nothing more was said about it; the matter was dropped.
Q. What time did you go to Clinton that year?
A. Soon after that, in that month of May.
After the evening when he drew his pistol and I went into my room, I spent the night crying; I spent most of the next day in bed; I think I may have taken food the next day; I probably did; I did not go downstairs the next morning; I don't remember what I did the next night; I cohabited with him after that, wrote him affectionate letters, and took money from him; I wrote to him as

soon as I reached Clinton; I have not a copy of the letter which I then wrote him.

Q. Have you got the letters which the defendant wrote you in 1889 and 1890?

A. I don't think I have, many of them; I may have some; I am not sure.

In January, 1889, the defendant said to me that I was shamefully regardless of his health; I don't remember that anything preceded that speech of his; that was all he said at the time in reference to my carelessness about his health; I mean the court to understand that he broke right out reproaching me; he said that I was a vain, unloving woman, and he said that I was shamefully regardless of his health, and he said that I only had married him to spend his money, that I only cared for his money and not for him; I told him that I did not know at the time we were married that he had any money; that I had married him because I loved him, and for no other reason.

Q. Did you state that in 1889 you received an unkind letter from your husband while you were at Clinton?

A. I don't remember that I did.

Q. Do you recollect of receiving an unkind letter from him?

48 A. I have received unkind letters from him.

Q. Wait a moment; in the summer of 1889, when you were at Clinton?

A. Yes, sir; I did.

Q. Have you that letter?

A. I don't know which one it refers to; there were several.

Q. Well, I don't know. You state here that "I had received unkind letters from my husband. I had received an unkind letter from my husband. I had slipped on the stairs and was very badly hurt." Now, have you got that letter?

A. I don't know whether I have or not.

Q. Will you kindly look and see?

A. I will.

On the morning following the day when the pistol was brandished I spoke to my husband when I first saw him; I don't remember when I first saw him; some time during the morning; I think he spoke to me; I didn't refer to the pistol matter; I have not from that day to this ever referred to it to him; I did not tell Mrs. Maria Atherton or Mr. John Atherton about it.

Q. You referred to a talk in the room of Mrs. Maria B. Atherton on October 3, 1891; did you tell me all that then took place?

A. I think very nearly all; there were one or two things that Mrs. Atherton said that I did not speak of.

Q. What were those things that you omitted?

A. One thing Mrs. John Atherton said to her son that he had done that day that he would rue all his life; another thing that she said to me was—she said that she also had been accused of infidelity.

Q. Did you find that letter from the defendant which I referred to before dinner?

49 A. I have not been at home, Mr. Beardsley.

I did not bring the letters with me; they are not in Utica; some of the letters are in Clinton, at my home.

Q. Will you send to Clinton and get them and bring them here—have them brought here?

A. I shall go home tonight, and will look for that letter then.

Q. Will you look for all his letters, and bring them all in tomorrow morning?

A. All I can find I will bring in.

Redirect examination by Mr. N. E. KERNAN:

The three pieces of furniture which were brought by me to Clinton, I think in the fall of 1889, were a desk and an old bureau and a dressing table that I had ever since I was a little girl; they belong to me; I had owned them all my life; they were taken back to Louisville very soon after I returned with my sister in March, and they were left there when I left the Atherton house in October, 1891; the bills that were shown me were not all purchases for myself; many of them were things for the house, dresses for my child, aprons for the servants and things of that kind; there were items on the bills that were mine, and there were other things; there were curtains, things which I had gotten for the house; in regard to the box in the safety deposit company, in which there were some bonds, those bonds were mine; they were given to me by a great-aunt; they were my own separate property; in the bank account spoken of there was some money deposited of mine which did not come from my husband; I had a little money of my own; at one time I had an allowance of $75; for a number of months I had no allowance; I charged things at the dressmakers'; afterwards the

50 $75 a month allowance was diminished to $60 for a time; the $75 was given me before the child was born, but that was intended to include all expenses of my own; when I was at Cresson, Pennsylvania, I received word that my mother was sick, and came home; I telegraphed to my husband in regard to my going home; I always wrote to my husband affectionate letters; I always tried to be affectionate in my deportment toward him; I always tried to please him in every regard; when I went to New York from Old Point Comfort, my auntie was very dangerously ill; that was my reason for going there, and another reason was that I wished very much to see my mother, naturally; but my auntie's illness was the reason of my going.

Recross-examination by Mr. BEARDSLEY:

Q. When you charged your husband with want of chastity, did you intend to be affectionate to him then?

A. I can only say that I did not charge him with infidelity.

Mrs. JULIA SHELDON NEARY, sworn for the plaintiff and examined by N. E. Kernan, testified as follows:

I know the plaintiff and defendant; I first met them on the 7th of January, 1890; I was not at that time married; I have since

married Mr. Neary at Gouverneur; I was at the time I met them a trained nurse; I had been living in New York city, and came to Clinton about the 7th of January; I was with Mrs. Atherton five weeks, having charge of her and the child; the child was born the next day after my arrival; the defendant was there; Mrs. Atherton had a front room, a large-sized front room, and I occupied a room right immediately back of it, and there was a door connecting the two rooms; Dr. Barrows was the physician in attend-
51 ance; Mr. Atherton's room was across the hall; it was quite near our room; he was in his wife's room often; he expressed a great deal of anxiety and care about his wife's condition, but he interfered with everything, and nothing that was done was according to his wishes; I remember his remaining all night in his wife's room shortly after the birth of the child; the child was about three days old, I think; Mr. Atherton told his wife that he was going to stay in her room; she told me of the fact; Mr. Atherton told his wife that he was going to stay in the room; I objected to it; he said he would stay; he insisted upon it; he said that to his wife, that he would stay; I said I didn't like it, that it ought not to be, that I had duties to perform, and I didn't wish him in the room; I did not say what the duties were; he ought to have known; they were duties in regard to his wife; he did stay all night; he remained there until early next morning; I had occasion to go in there during the night with the baby; I was obliged to go in there; I think I went in twice to give her some attention; he was in bed with his wife; I was in the next room all the night with the baby; I heard him talking until I went to sleep; I could not hear what he said; he was talking in an ordinary tone; he was talking continually without any letting up at all.

Q. Whether it was angry or not?

A. It didn't sound very good-natured; that is what I thought.

He didn't talk any when I was in there; he remained there until about four o'clock in the morning; Mrs. Atherton called me at that time; he opened the door before he went out and she called me to attend to her, then he went out of the room; during that following week or two weeks he was in his wife's room there quite often,
52 as often as I would allow him; he never asked me to go out, but I did go out when he would go in; he would close the door after I had gone out; I could hear him talking; he used to be in there quite often afternoons, and I could hear him talking all the time; his tone of voice was nearly always angry; some of the time it was loud, not always; she was in bed at the time; she was quite weak; I thought these talks had a very injurious effect on her.

Q. Now, on any of these occasions, did you find her crying?

A. I did; I would frequently find her crying when I would go into the room; she would be nervous and excited, all worked up after these conversations; I thought it was very injurious to her.

I remember in regard to her having chills at that time; she had two chills during January; they were after occasions when he had been talking to her in this way; she was crying; I know that he had been into the room some time during the morning, and then he

came in again in the afternoon; after lunch was there quite a while; in fact he was there nearly the whole afternoon, talking and talking and talking; I went in to attend to her for some little thing, to give her medicine or to give her the baby; he would stop talking when I would enter the room; then when I attended to her I would leave the room and he would close the door again and commence his talking, and again in the evening after dinner; then about 12 o'clock she called me saying she was feeling very cold; I went in and saw that her teeth were chattering and she was having a very severe chill, and I was much alarmed, and I did what I could, and I called her father later, and she remained in the chill for four hours, and she had a very high temperature after that; she had a lighter chill the second or third day after that; the second chill was not
53 as severe as the first, but still he had been in the room again talking to her; I was continually saying that she must be kept more quiet, but it made no difference; he was continually in the room every opportunity he would get.

Q. Were you there on any occasion when her father and mother came up?

A. I was.

That was after she had had the chill; that is on another occasion; he had been in the room again; he came in very soon after lunch and he spent the whole afternoon there, and still he was talking just the same as usual, in fact I thought very angrily; his voice—I couldn't hear the words he said, because he had the door closed—but the tone of his voice sounded very angry; the door was closed; Mrs. Kelsey came upstairs and went into Mrs. Atherton's room and remained there; I didn't hear what was said in there, in his wife's room; Mr. Kelsey came up a little after that; it was almost dark—after he came from college; he went into his daughter's room; Mr. Atherton was there; I was in my own room; the door was open; Mr. Kelsey left the door open when he went in; I heard Mr. Kelsey say, "I think there has been talk enough; I think Mary ought to be kept quiet; so much talking is very injurious;" immediately Mr. Atherton spoke up in a towering passion, and I heard him storming back and forth in the room, and he thought it was a great note that he could not stay in his wife's room—that he could not say a word to his wife; he was going to leave the house; he would not stay another hour in the house, and he stormed up and down in the room; I don't remember any other language except that, that he should not stay under that roof, but I know he was talking all the time; this continued ten or
54 fifteen minutes; his wife was in bed; this was about three weeks after the birth of the child; Mrs. Atherton's condition afterwards was that she was very nervous, and very much broken up over it; she was crying and weeping, and was in great distress; after he had stormed around for a while, then he stormed out in my room, and there was a closet opening off of my room; he had a trunk in there, and he opened the closet door, and he seized the trunk by one handle, and he dragged it over the threshold through my room out into the hall, and commenced throwing his things

into it, and he was going to leave that house, and he wouldn't stay another hour under that roof; that is all I know about it, that part of it, because they all went downstairs at that time; I heard them all talking downstairs; Mrs. Kelsey and the Professor, and Miss Goodenow and Miss Ethel Kelsey were down there some time; the defendant went downstairs; I heard different voices; I heard them talking, but of course I knew they were talking because the sound of their voices reached my ears; I did not distinguish what was said; the defendant on these occasions was very much excited, and he was walking back and forth, and was very angry; he made motions with his hands, and his arms were waving and gesticulating a good deal; after these occurrences I would find Mrs. Atherton in tears, crying, very nervous, and very much wrought up over it; she would feel very sorrowful and very nervous, and feel very bad, anyway; her sleep was not as good as it should have been; I thought she was exhausted.

Cross-examination by Mr. BEARDSLEY:

Mrs. Atherton sat up the first time after the baby was three weeks old; the baby was three weeks old before she was out of bed.

Q. That is not unusual, is it?

55 A. Yes, sir; it is sometimes.

Q. Well, is it extraordinary that she did not get up before three weeks?

A. No, sir.

I heard what Prof. Kelsey said when he first went into the room; I did not hear him say anything else; I did not hear Mrs. Kelsey say much of anything; I remember some things that the defendant said; that he was not going to stay any longer under that roof; that he should leave that very night; I don't remember the plaintiff saying anything; she may have said something, but I didn't hear her; I don't think Miss Ethel Kelsey was in there at the time; she may have been, but I don't remember.

Q. After childbirth are people usually nervous?

A. They ought not to be.

Q. Well, are they as a matter of fact?

A. No, they are not.

Q. Are some people after childbirth nervous?

A. Possibly they may be.

Q. Don't you know that they are?

A. It depends upon what other troubles they have; yes, I suppose they could be.

Q. Don't you know they give anodynes to put them to sleep?

A. I have never known that to be done in childbirth; I may have heard of it, if they have some other trouble.

As a rule, sleep is not disturbed by childbirth; they have to be aroused during the night sometimes; I used to awaken Mrs. Atherton to attend to the child; Mrs. Atherton was injured during childbirth, causing pain and suffering; right after childbirth she slept well during the night; after she began to sit up she con-

56 tinued to do so; I think she went downstairs in the fifth week; she came upstairs after going down; Mr. Atherton

found fault with me, not because things were not kept cleanly; he was finding fault about everything nearly; I don't remember that he said that I left things lying around the room which ought not to be left there.

Q. Didn't he find fault with you for leaving cloths around which had been about the person of Mrs. Atherton?

A. No, sir.

Q. What did he find fault with you for?

A. He found fault because some of the child's napkins were in the next room; he found fault with the temperature of the room; napkins were not left lying around; they were poked under the grate; I don't remember of calling Mr. Atherton when Mrs. Atherton had a chill; he came into the room; he did not make the fire in the grate; I think I made a fire in the grate myself; I don't remember that I made the fire before he came in; the room was heated by steam; the morning when I found Mrs. Atherton in a chill I know the heat was turned off; I know there was no heat in the radiator that morning; I did not turn it on; I supposed it could not get on until after Prof. Kelsey had gone downstairs and turned it on somewhere; I know that Prof. Kelsey had to go downstairs in the cellar; I noted the temperature in the room from time to time; sometimes I had it as high as eighty; I don't remember of ever having it as high as eighty-eight.

Q. Do you consider that a good thing right after childbirth, to have a temperature of eighty?

A. If it was necessary for the patient to have certain attentions, it is necessary that the temperature of the room should be of that degree.

57 The proper temperature of the room after childbirth can be seventy or seventy-five; I don't know that high temperature promotes flowing and a tendency to fever; I have not tried; I was educated as a nurse in the New York City training school for nurses; it is one of the directions and rules for nurses that after childbirth the temperature of the room should be kept at a certain degree, about seventy or seventy-five.

Redirect examination by Mr. MILLS:

Q. Mrs. Neary, you have spoken of the defendant coming into the room and shutting the door, and after that you heard a loud voice in the plaintiff's room; how soon after the child was born was it that you first observed that conduct on the part of the defendant?

A. Well, I think it was about the second week or so; the next week after the birth of the child.

Recross-examination by Mr. BEARDSLEY:

Mr. Atherton did not always speak in a loud voice, sometimes he did, not always; being in the other room I never overheard him so as to know what he said.

Mrs. CATHERINE REARDON, sworn by the plaintiff and examined by Mr. N. E. Kernan, testifies as follows:

I live in Louisville, Ky., and know Mrs. Atherton; was a nurse for her child for over fourteen months, beginning in September, I could not tell exactly the day, the fore part of September, 1890, and continuing up until Mrs. Atherton left Louisville with her bady in October, 1891; I had charge of the child up to that time; when I first went to be the nurse, I observed that Mr. Peter Lee Atherton, the father of the baby, was as general thing very hard to
58 please and very disagreeable, and on many occasions unkind to his wife; whenever he had anything to say he generally called his wife into another room and locked the door, or else if it was convenient for me to take the child out, he ordered me out of the room and locked the door; as a general thing the transoms of the doors were open; he usually took her in the room and locked the door and consequently I could not hear any words, but I heard a very loud and angry voice from him; I never heard hers; at a time he would keep her there sometimes for an hour and she would come out in tears and throw herself on her own bed and cry; I could not hear what was said; I could if I had listened, but I didn't wan't to do that; the tone of his voice was always angry and loud when he locked the door, or else I would not have heard him; I never heard her speak an unkind word to him; I very often heard him finding fault with her; he said she was not fit to take care of the baby; this was frequent, I suppose every month, and maybe oftener; it was soon after I went there, about a month or so after I went there he told her that she was not fit to take care of the baby, that she was dirty and slovenly, and found fault with the baby's food at different times; one time when she heard him coming upstairs, she went to the head of the stairs to meet him very pleasantly; it may have been two or three weeks after I went there, and as he got up he pushed her away, and went on by her and went into his own room; he pushed her just with his hand, pushed her away; she went to greet him and he would not permit it; his looks would indicate anger, but he didn't say anything; he went into his own room and shut the door.

Q. Do you remember an occasion when he called her into the room and locked the door and remained some time, and you heard his voice loud and angry, and when he opened the door she was exhausted?

59 A. Yes, sir.

Objected to.

The COURT: The question is not proper. It is altogether too leading. Fix the time and place, and then let her state what occurred.

Q. State what you remember.

A. Well, he opened the door and it was—I believe she told me herself that he had lifted her and put her on the bed.

She was lying on the bed, very much exhausted indeed, and he went to the telephone, and he telephoned for the doctor, and told

him to come at once, and the doctor did come, and I was called into the room and waited on the doctor for what he wanted, got some glasses and fresh water and a spoon, &c.; she stayed there until quite late, a. l the doctor stayed there, too; he inquired the cause of it, and she told him; that was said in the presence of Mr. Atherton; I believe he came back with the doctor to the door; the doctor said—Dr. Monroe, it was—he didn't speak it plain to him, but he asked her what was the cause of this nervous prostration—wasn't it abuse—and she acknowledged that it was, and she had to stay in bed; I don't believe she got up at all that evening until she was removed to her own room; this was the only occasion that she had to be carried to her bed after one of these occurrences that I remember; she was carried then; she told me—I was not in the room when he locked the door—that he carried her and put her on the bed and went and telephoned for the doctor; I suppose she was crying; I didn't hear her crying, but I knew from her appearance that she was crying; sometimes she would tell me to bring the baby down while I ate my meals, and after meals some-
60 times she would go into the parlor and play and sing; she was, and she is still, a very good church member, and she would be playing church music; she was playing, and he told her to stop that damned noise; I suppose if it was anything lively he would not say that; her manner towards him was very kindly always; I have never known her to say an angry word to him.

Q. Her deportment toward him was affectionate and kind?

A. Very, always.

I was there up to October, 1891; I was there on the second and third day of October, when she left the house; I was in the house when she left; I was there half an hour before or half an hour after, maybe; I was there when Mr. Atherton came up and took the baby; after he came home he was very unpleasant and very unkind; he didn't show her a pleasant face; on that morning in particular there was something said before they went to breakfast; I was attending to the baby, and she was in her dressing-room, and he went in there, and there was some very angry words; I didn't hear what the words were; they went down to breakfast, and after they came back they went in through the bath-room and into her dressing-room, and there was very angry words; I didn't hear her words, but she said something, but his words were the loudest; then they came in; Mrs. Atherton, the baby's mother, told me to go down to breakfast, and I did; when I came back the state of affairs was worse, and she was standing outside her door and had the baby in her arms; he took the baby from her by force and went into his room on the other side of the hall, and I tried to go in to see if I could take the baby and please it, and I could not; he held the baby in his arms and the baby's mother followed to the door and she went inside of the door, and he got
61 hold of her by the arm and he pulled her right around and pushed her out and told her to go to her own room and stay there, that she should not have the baby any more and he didn't want her in his room, and he shut the door and locked it; I, of

course, felt great sympathy, but I was afraid to say anything for fear that it would make him feel very angry; I wanted to take the baby; he told me to put it to sleep; I told him I could not put her to sleep in that state of nervousness, and she cried very hard and screamed for her mother, and nothing could please her really, and she was on the point of going into hysterics or something worse, and consequently he let the mother come in and take the child, and the mother sat down in a chair and rocked her to sleep; he went outside of the door and I said, "Mr. Peter Lee, I want to go to town for a little while;" he said, "Where are the baby's clothes?" I says, "The principal part of them are at the laundry;" says he, "When will they be home?" says I, "This is Saturday; I suppose they will be here this afternoon;" says he, "Can't you get them?" I says, "I can't;" says he, "Where are her other clothes?" I says, "They are all in her chiffoniers in her room;" then I told him about going into town; he wanted to know when I would be back, and I told him it would be inside of an hour, and he said all right; so I went downstairs and I met an old acquaintance of mine coming upstairs that I had known for twenty years, that he had hired for a nurse to go with him; when I returned from town Mrs. Atherton was gone with the baby, and I met Mr. Peter Lee Atherton, and he said, "Did you see my wife and child?" says I, "I did not;" says he, "Go through the yard and see if you can find them;" as I was going through the nurse said, "She has gone;" I did not look any
62 further, and he came upstairs and went to the telephone and telephoned for his father—I suppose so because he says, "Is that you, father?" and I suppose he got an answer, and he says, "Come home at once;" it wasn't very long before his father came home; they went in the bath-room as usual and the transom was open, and he said to his father, "She has gone and taken the baby;" the father says, "You damn fool, why did you allow that?" "Well," says he, "Father, you know you have always been telling me to take the baby from her, and I tried to do it this time;" so they spoke very angrily there together for some time, and then they suggested search for Mrs. Atherton, and they went, I believe, to the stable to get a buggy or something to go; so I lost sight of her after that until I found out where she was, and then I was advised to take some fruit to the child; in September, 1891, when Mrs. Atherton and the baby and I had been visiting at Clinton and went back to Louisville, the defendant's father met us at Cincinnati, the defendant did not; the defendant met us at the station in Louisville; the grandfather took the baby from its mother and handed it to the father of the child and he went into the carriage that was there in waiting, and his wife, the baby's mother, followed him, and they both sat down and I followed after and sat in front of the carriage and she says to him—he never noticed her all this time; he hadn't seen her for a month—"Peter Lee, won't you kiss me?" and he turned right from her and she kissed him on the side of the neck; I don't think he spoke to her; hardly a word to her on the way home, and didn't seem at all on civil terms with her when they got home.

Q. How long had you been absent at that time? How long had you been here at Clinton?

A. Well, we were only home a few days from March until
63 we went home for a change of clothing; we were only home a few days when we went back to Clinton and stayed until September; it was from May until September.

I know the defendant had a pistol, and I was always afraid to open the drawer where it was in; he kept it in his top bureau drawer.

Q. Do you know whether it was loaded?

A. I don't know much about pistols, but I think it was, for I had a perfect dread of it.

Cross-examination by Mr. HUMPHREY:

I live in Louisville, and was employed by Mrs. Atherton as a nurse in September, 1890; I remained with her as nurse until October, 1891; after she took the baby away from the house I was not the nurse for the child any more and have never since been the nurse of that child; Mrs. Atherton left Louisville, in October, 1891; I came to Clinton in May of 1893; I stayed there six weeks more or less; I was not employed as a nurse for the child, though I took care of her nevertheless; I seen to her during the time, but I was not employed there; I just come to see the family; I was invited to come by Mrs. Goodenow; she wrote for me; I was made welcome by all the family; the child had no other nurse during the six weeks I was at Clinton; I don't know that it had a nurse prior to my coming; I then returned to Kentucky for about three weeks; I have been here again a little over a week.

Q. You must have come before the first of May then, didn't you, if you were here six weeks and in Louisville four weeks, and have been here a week; that would be eleven weeks?

A. It may be a little more or less; I told you at the com-
64 mencement that I didn't take the date of hours or minutes; I don't intend to burden my memory with all that kind of stuff.

Q. Are you staying down with Mrs. Mary Atherton, at Mrs. Kelsey's place, at Clinton?

A. I am, when I am there.

I have been since I returned this second time; I am not in the employ of the family and have not been at any time, was not during that six weeks except seeing to the baby occasionally; I was employed at the Athertons in September, 1890; this was after Mrs. Atherton returned from Clinton; I went South with the family in February, 1891; they took quite an extensive trip; they went to Pass Christian; they did not go to Thomasville, but did to Tallahassee; they stayed down there on that trip until March, 1891, when they heard the news of the illness of Prof. Kelsey, and then they immediately came via Louisville to Clinton; they went as quick from Tallahassee to Clinton as they could go; the husband accompanied his wife and child from Tallahassee to Clinton; I don't know how long the defendant stayed at Tallahassee, because he left us at Pass

Christian and went on a fishing and hunting excursion with a gentleman from Louisville; his wife and child and I traveled alone from Pass Christian to Tallahassee; he went on there with a gentleman from Louisville, Mr. Lee Hall; he telegraphed for his wife to come over to Tallahassee, and his wife and the baby and I went over; while at Tallahassee I know only of one day that Mrs. Atherton went out hunting with Mr. Atherton, and I think the horse he got for her was too wild; she went once fishing; I don't know whether they used to play cards there together at night.

Q. You didn't observe their life in Tallahassee?

65 A. I had to attend to the baby in the nursery, and I knew very little of what happened of evenings there after supper.

Q. She did not stay in the nursery? She was off with Mr. Peter Lee?

A. Why, no, you couldn't expect her to stay in the nursery.

Q. She was off with Mr. Peter Lee?

A. I don't know where they were; sometimes they would go for a walk, and sometimes she would sit upstairs in her room and perhaps write some letters.

After the death of Prof. Kelsey and the burial, Mr. Peter Lee Atherton was taken sick, and he was sick for several days, and his wife took care of him and had a doctor for him; as soon as he got well, I believe, he went home; he started from Clinton to go home, and we stayed there; he told her that she could stay until she got well rested, and in May some time——

Q. You say that he said that she could stay until she got well rested?

A. Yes, sir.

Q. This was in the month of March?

A. Yes, sir.

Q. Well, when did she get well rested?

A. We went back to Louisville some time in May.

Q. Was it to the middle of May that it took her to get well rested?

A. I don't know how long it took her to get well rested, but at any rate that was when we went back.

We didn't stay in Louisville long, not as much as a month, because we went back to Clinton in June—that is the baby and Mrs. Atherton and I—and returned about the middle of September to Louisville; Mrs. Atherton was at home a few days before she left the house with the baby; it might be a week.

66 Q. Do I understand you to say that on a certain occasion Dr. Monroe was sent for to see Mrs. Atherton?

A. Yes, sir.

Q. That he came into the room and that Dr. Monroe asked her what was the matter with her, and asked her if it was not abuse; did you say that?

A. I didn't hear those words, but I heard of it; I didn't hear him say those words, but I heard that he did.

Q. Well, who told you that he did?

A. Mrs. Atherton.

Q. You didn't hear him say that?

A. No, I did not, although I was in the room when he was there, for I waited on him.

Q. What did he say?

A. He didn't have anything to say while I was there; he was prescribing for Mrs. Atherton.

Q. Nothing was said while you were there yourself, but Mrs. Atherton subsequently told you that Dr. Monroe asked her if it was not abuse, and she acknowledged that it was?

A. Yes, sir; but Mr. Peter Lee had locked the door and talked to her.

On one occasion, that was downstairs, I was getting my meal, and Mrs. Atherton was playing on the piano and singing; the baby was playing around the room; I could not give the date; the baby was able to walk around; I believe she walked within a year; I came into the room for the baby to take her upstairs; he came into the room while she was playing on the piano; there was some other lady there, I don't know who she was; I think it was the housekeeper they had there, and he told her to stop that damned noise.

67 Q. When he came into the room that was the first time he had seen her?

A. No; this was after he came, and she went in there and took the baby with her and commenced playing, and he went in there.

He said, "Stop that damned nonsense;" she stopped because she turned around in surprise; she turned around in surprise when she heard the words; I don't know that she was so surprised to hear him use the words; I don't know that she knew who it was; I don't know whether she knew who expressed the words; when she saw her husband I don't think she was very much surprised that he should use that language; she was surprised when she heard the noise, not knowing who expressed it; then when she saw her husband she was not surprised, for she very frequently heard them, I think; on the third day of October, 1891, Mr. and Mrs. Atherton were talking unpleasantly before I went down to breakfast; Mrs. Atherton was not talking unpleasantly; she took the baby and sat down on the sofa and her husband followed her in from the dressing-room, and I walked out; Mr. Atherton was talking unpleasantly; Mrs. Atherton was simply listening to him.

Q. Did you ever hear Mr. Atherton say a pleasant word to Mrs. Atherton?

A. I never did.

Q. Did you ever see her temper in any way ruffled when he was talking with her?

A. No, sir.

Q. You never saw any anger?

A. No, sir.

Q. Or any emotion except crying?

A. Never an unkind word did she ever give him.

Q. You never saw her angry?

68 A. No, sir.

Q. Or resentful?
A. No, sir.
Q. Or unkind?
A. No, sir.
Q. Now, on this occasion she was not angry, do I understand you to say?
A. When?
Q. On the 3d of October—that morning when you went down to breakfast. Was she angry?
A. No, sir; I didn't notice it if she was.
Q. When you came upstairs, where were Mr. and Mrs. Atherton at that time?
A. Mrs. Atherton was standing outside the bed-room door, and she had the baby in her arms in the hall.
Q. Where did Mr. Atherton stand?
A. He came out of the room, I believe, and he took hold of the child and took it away from her by force.
Q. Out of what room did he come?
A. I don't know whether out of her room or out of the bath-room, but it was out of one or the other.
Q. When you got up on the landing where you could see the hall, Mrs. Atherton was standing there with the child? Was Mr. Atherton in sight?
A. Not then, he was not.
Q. But after you got up there he came out of either his room or the bath-room. Did he say anything?
A. I didn't hear anything, because I went into the room on the other side.
Q. Did you shut the door?
A. No, sir; I did not.
Q. You heard him say nothing?
A. I was waiting to get the baby; he took the child away from her, and the child began to cry.
69 Q. Did you hear him say anything?
A. After he got to the room——
Q. Before he got there?
A. No, sir, not a word before he took the child.
Q. Were you where you could have heard him?
A. Well, I was on my way to the room; I didn't pay any attention to what they were saying, or if they were saying anything; I went straight to the room where I belonged.
Q. You opened the door?
A. The door was open.
Q. You went in?
A. Yes, sir.
Q. You didn't close it?
A. No, sir.
Q. Did you hear him say anything to her?
A. He came straight to the room after he took the child out of her arms, and he said, "You shall not have the child again."
Q. Did she say anything before he took the child out of her arms?

A. Not that I heard.
Q. Did she say anything to him?
A. No, sir, not that I heard.
Q. Were you where you could see what occurred?
A. I was.
Q. Were you where you could see what occurred?
A. I was.
Q. Were you inside of the room?
A. No, sir; I passed by her when he took the child out of her arms, and I went straight into the room, and he followed with the child in his arms, and his wife went also; and the child was crying, and when she went inside of the door he paid no attention,
70 and he had the child in his arms, and he took hold of her by the arm and pushed her out of the room and told her to go to her own room, that she should never have the child in her arms again, and to stay in her own room; and he shut the door and locked it.
Q. Did he give you the child then?
A. He asked me to put the child to sleep, and I took her and the child would not go to sleep; I told him that the child was in a state of nervousness, and she would not go to sleep; I could not put her to sleep; he said "Try;" I sat down in the chair, and the more I rocked her the more she would cry, until at last he was afraid it would be the cause of injuring the child, and he let the mother come in.

Redirect examination by Mr. N. E. KERNAN:

Q. At the time you were speaking of in October, 1891, when the defendant, Mr. Peter Lee Atherton, took the child into the room, and you were there and tried to put the child asleep, and finally he unlocked the door and his wife came in, state, if you remember, what was his wife's condition then.
A. She was hardly able to bring herself in across the hall, she had been so exhausted from what she had gone through.
Q. Was she crying?
A. She had been crying all the time, she was crying in his mother's room, she was crying when she came up, and she was crying when she took the child.

Miss CLARA ANNA GOODENOW, sworn for the plaintiff and examined by Mr. N. E. Kernan, testifies as follows:
71 I have a home in Lancaster, Mass.; I am aunt of plaintiff and the sister of Mrs. Kelsey; I remember when Mrs. Atherton was staying with her mother that she had a fall; I think I sent a dispatch to defendant to Syracuse; I went to Utica to meet him; that was the day of the accident; she fell in the morning; I went to Utica with my little nephew and met the defendant at the train, I think about noon; we greeted each other and he asked me what it meant, and I told him that Mary had had a fall, and when I came away I could not tell how serious the injury might be; in her condition I was very anxious; he asked what she was doing; he

said, "Wasn't Mary careless somehow? What was she doing when she fell?" and I said I didn't think she was careless; he repeated, "What was she doing? How did she fall?" I said, "She was crying over one of your letters and was blind with tears and she made a misstep;" we remained at Bagg's hotel a little while until Mr. Atherton had his dinner; we then took a carriage and drove to Clinton; when we got to Clinton he went in to see his wife; I was not in the room then; later he was downstairs; I heard him talking with my sister in the library; I think it was that afternoon; I did not hear all the conversation; I heard him say, "I have a letter which will be very compromising to you; I intend to show it to your husband; if I were to publish the letter it would seriously compromise you;" my sister said, "You are very welcome to publish all the letters I have written to you, and I will publish the letters from Mary which called them forth;" I did not remain in the room but went out on the piazza; later Mr. Atherton came out where I was; he said he wished to explain why he had come; that he should not have come under the roof where he had been ill treated, and knowing the feeling that existed towards him and the feeling he had for the family, except for the circumstances;
72 I said then, "Why did you come at all?" He said, "Well for the looks of it; it would not look very well if anything happened to Mary and I was not here;" I said, "You need not have taken the trouble to come on that account;" at that time I asked him to tell me what he meant by the feeling he seemed to think I had, that I would be glad to explain anything I could, which seemed to him out of the way; that I really did not know what he was indicting or arraigning me for; he said he would be unable to make it plain because he would be obliged to use language which he thought unfit to use to a lady and his delicacy did not allow him to explain exactly what it was.

In talking with my sister his tone was loud and angry; on that occasion he declined to tell me anything further as to what I had done or any occasion of his remark to me, although I asked him, giving the reason I have stated; the next day I heard him talking to my niece in loud, harsh tone; her physician had said she must not move much from a recumbent position on account of the fall; she was lying either on the bed or sofa in her room; I heard him say that he should insist upon an explanation; I heard him use the phrase, "This must be settled;" I did not hear very much more; he talked on for a while in this loud and angry tone; I was in the next room and went out into the hall; he went from the room and I went in where my niece was and found her crying; I don't know exactly how long he was there talking to her at this time; I came upstairs and I should think he was in there half an hour after I heard him; twenty minutes or half an hour; I had some talk with him that day; he was in the room where I was, adjoining my niece's room; I said I wished to know what offended him so; that I was quite ready for any indictment, but
73 would he explain; he said to me that he had had very unkind treatment from my sister and from me; he said that he felt

that I had influenced my niece in an improper way; he said I had done something which had offended him very much, but it was really too delicate for him to tell me what it was or what I had said to which he took such exception; he spoke of my niece and said there were things which must be explained; he walked up and down the room and waived his arms a good deal and snapped his fingers, seemingly irritated and angry; I heard him at that time or subsequently when he was in the room with his wife, say to her that she ought to be ashamed of herself; I cannot state whether it was that day or the next; I heard him talking to her at that time; I should think this was the morning of the third day; I am not sure; I think he was there about three days, and went away the third day, but I am not positive about that; I heard him talking in a loud and angry voice; I heard him say that it was time that this matter was settled; that he should speak to her father about the letter; there was a good deal of conversation that went on; I went into the room immediately after he went out and found her crying; she was on the sofa; he had been talking to her some time; I was not all the time in the next room; I should think he was there an hour, for I know that he went upstairs some time before I did.

Q. To go back a little, were you there before this time—before the fall in the January previous when he was there at any time, or was this the first time?

A. This was the first time; the fall was in July, and I was there in January after; he stayed at Clinton about three days at the time of her fall; I went to his room soon after I left my niece crying, and I said to him that I should really like to know wherein
74 I had been such an evil genius to him and his wife as he seemed to think; I said it kindly; I asked him if he would tell me what I had done or said; what fault he had found with me; he said he could not talk about it then; that he should be obliged to use very unpleasant language to a lady, and he was going away soon, and he would rather not talk.

I was at Clinton in the January following before the child was born; the defendant came there; I was sick at the time, occupying a front room in the third story which adjoined the room that my niece had temporarily; the rooms were side by side; over the door of my room was a portiere, and a transom over that, which was covered; the door had been taken off, and the portiere covered it; the night of his arrival I heard Mr. Atherton with my niece; his voice was raised in angry tones; I heard him talking for some time; I heard some things that he said; I heard him say that it was an insult to him; I heard him mention the small room; I think he said it was an insult to him to put him in such a small room; he said that there was always a conspiracy to insult him; I heard him say, "You are indelicate; it is immodest to have young men in the house at this time;" I did not hear all this at one time; I heard her sobbing and crying after a while; I did not hear anything she said; later on I heard him say, "I do not believe it; she is up here for a spy;" the talking and sobbing and the crying continued until to-

ward morning; I heard my niece sob and speak to him while sobbing; I heard his voice loud and harsh; I heard these things I have stated repeated once or twice; I heard him say your family are—I think he said "immodest"—"immodest" or "indelicate;" toward morning I think I heard him moving about the room; I heard my niece's voice change a little; there was some noise different from their talking; the two boys that were there were Mr. Samuel
75 Evans and young Frank Evans, brothers of the fiance of my niece, Ethel Kelsey; one was about twenty, perhaps, and the other was a lad of fourteen; they came before the defendant did; they were there one night before he was there, and I think they left the day after his arrival; his room and his wife's were changed to the second story—two large connecting rooms; I was present at the house the day the baby was born; I think it was born about two o'clock; defendant was at Utica, and came home on the noon train; I remember the occasion of her having a chill; the child was more than a fortnight old, I should think.

Q. Did you hear anything as between Mr. and Mrs. Atherton the day or night before?

A. I heard him in her room talking in a very loud, continuous fashion.

Q. When was that?

A. The day before she had the chill in the night.

She had the chill about two weeks after the birth; I should think this took place somewhere, perhaps, the 23d or 25th of January; at one time in that day before the chill, I think it was in the evening, I was in the hall and I heard his voice continuously talking and loud, and I heard him say, "You have no regard for my wishes;" he was then in my niece's room; "You are very heedless;" his tone was angry and harsh; I don't remember anything else that he said that night.

Q. Do you remember his saying, "I have a right to do what I please," or words to that effect?

A. I remember his saying that, but I do not place it that night exactly.

At this time he was talking there a large part of the evening; I think it was after dinner; he was there during the afternoon talking, because I heard his voice there, and he was there in the
76 evening; she had a chill that night; I did not see her during the chill; I just looked in at her next morning and saw her lying there, that she looked ill; I remember an occasion shortly after, that he was in his room and talked; I should think it was somewhere the last of January; it might have been the 28th; it was the last of his stay there; he was in the room talking, talking and talking more; his voice was loud and angry; she was in her room in bed; I went upstairs and heard this loud and angry talk; I saw the nurse and my niece in the adjoining room; I waited a moment in the hall; I heard it loud and long continued; my niece appealed to me; I went toward the door almost involuntarily; as I stood by the door I heard him say, "You are false as a woman; you are unnatural;" he repeated the expression, "false as

a woman;" I was quite startled and quite uncertain as to what his meaning might be, and I drew back and went to the other side of the hall; my sister, Mrs. Kelsey, came upstairs and she went in; I should say she was in there some moments and some talking continued by Mr. Atherton, and Mr. Kelsey went in a little later; Mr. Atherton came out; I saw him go storming or striding through my niece's room into the hall and dragging a trunk after him; his manner was that of a violently, insanely, angry man; I saw him dragging the trunk and I heard him say, "I won't sleep another night under this roof; I am insulted here; I will go tonight;" I went downstairs; I think I went down first; Mr. Kelsey was in the hall; we all went downstairs after that; at this time when I heard him talking to my niece, he talked in this manner a long time; I should think he was there half an hour; I heard him say up there in her room, as he came out, that he should talk to his wife; he thought it was a pity that he could not talk to his wife without so much fuss or so much trouble,
77 I don't remember exactly what; as he came out of the door he said, "I have a right to talk to my wife; it seems strange that I can't;" I cannot repeat the exact language; I did not see or hear her; I heard her when the door was open sobbing, but did not hear anything she said, and neither did I hear her cry out; I heard him say on one of these occasions, "You do not love me or you would regard my wishes," or something to that effect; he was in the hall downstairs in a very passionate condition, and said that he was going away at once, and I think he asked if he could have the horses or the man to take him down; he went into the parlor and he said it was always the way—he was always insulted; Mary and I cannot be happy together; I said, "Why not?" he said, well, there seemed to be no happiness for them; I said I thought there was happiness for them, if he would keep the promise he made to her in Boston, to love her and cherish her, and I reminded him that he said, "May God do so to me as I do to her;" I said, "If God does deal with you as you deal with Mary, I fear it will not be well with you;" I asked him what was the reason of all this passion; my sister asked him why he made so much talk about the operation when it could not be performed while the child was nursing, and he said that he did not know that; he talked and walked up and down the room and when I said something which I do not remember now, he said I had written very objectionally to his father; that his father said that I had expressed myself in a very indelicate and immodest way, and that it was impossible to say anything about matters to me when I had been guilty of indelicacy of expression and meaning; I asked him what he meant; I said I was not accustomed to being called an immodest, indelicate or impure woman, and was not accustomed to men who
78 twisted my words to mean that, and I asked him what he meant; he said that I said that he could not have any children; I said I never mentioned anything about children at all to him or to his father; and Mr. Kelsey said that men did not discuss such matters or make such insinuations to women; I think he went away

the next day; I was there in July, 1890; that is the July after the birth of the child when my neice and her baby came to Clinton; she was not at all well; she had very severe nervous attacks during that month; once or twice I wrote for her to her husband's mother, reporting the condition of the baby; my sister, Mrs. Kelsey, was sick at the time, threatened with an attack of pneumonia; my niece and her child remained in Clinton at that time during August and into September, when they went to New York; I accompanied them; Mr. Atherton met us at the Grand Central station in New York; he came along up the platform and said, "Oh, Mary, how do you do, Mary," and he took the baby in his arms and kissed it; I don't remember that he kissed my niece; I think he did not; I went to the hotel and had my room, and he had engaged rooms for himself and family; I was there several days; on one occasion their return to Louisville was spoken of, and I asked if he intended to keep Carrie, the nurse, and he said, "I think we shall keep her until the baby is weaned; when the baby is weaned we may want a different kind of a nurse; I shall keep her until then;" I went to Louisville in October, 1891; my niece was at the house of Mrs. Belknap's; my niece was very nervous, very much agitated; I should call her heart-broken; when I got there she was up in her wrapper, and when I entered the room she threw herself into my arms and cried bitterly;
she was so agitated and nervous that I was obliged to sup-
79 port her to the sofa and persuade her to be calm, and she was physically and mentally very much upset; we were there in Louisville, I think, a week or ten days; she remained at Mrs. Belknap's, and came to me at the Galt house after I had secured rooms there on Tuesday; I left Louisville with her.

Cross-examination by Mr. BEARDSLEY:

I cannot say that the plaintiff has recovered from being heart-broken; she is a very sad woman at times; I hope it is peculiar for a woman to feel as she felt; I know how she has felt by seeing her crying all night—by her want of sleep; I saw the defendant kiss the plaintiff in Boston when they were engaged; I think I have seen him kiss her since that, but not often; I have seen him kiss her.

I never said the defendant would never have children; I never made that a matter of thought or conversation.

On the occasion in January, 1890, I heard the defendant say, "I have a right to do as I please;" I did not hear all of the conversation, I did not hear him or Mrs. Atherton say anything which called for that remark; I heard him say that she had no regard for his wishes; I didn't hear anything which preceded that; I heard the voices; I heard him say, "Your family is indelicate;" I think he also said immodest; I think it was before that I heard him say that he was mistreated—that it was an insult to put him in that small room; I didn't hear what was said by any one just before he said, "Your family is immodest and indelicate;" I was not in the same room; I was in the next room; I did not call their attention to the fact that I was overhearing them; Mr. Atherton occupied

that night the room adjoining the room where I was on the third floor; his wife was occupying the same room; it was a smaller
80 room than several others in the house; two people have been in it comfortably; I should not call it a small room for two people; it was about that room that he was complaining—the room which he and his wife were occupying for that night; I was sick at that time; I was not out of bed during the night.

Q. Did you lie there listening to what was going on in the next room?

A. I lay there, and I heard what was going on.

Q. Were you listening to hear?

A. I was making no effort to hear; it was not so pleasant that I cared to hear.

Q. Did you try not to hear?

A. I did at one time.

Q. Did you shut up your ears and cover them?

A. No.

Q. You did not struggle to that extent?

A. No, sir; I had no occasion to do so.

Q. You heard him say to his wife that she ought to be ashamed of herself?

A. Yes, sir.

Q. Did you hear what preceded that?

A. It came after his speaking of the company of the—of there being company in the house.

Q. Well, did he say that she ought to be ashamed of herself, or they ought to be ashamed of themselves?

A. He said, "You ought to be ashamed of yourself."

Q. You did not hear what preceded it?

A. Not immediately, if you mean what she said.

Q. Did you hear what she said?

A. I did not; I heard her sobbing.

Q. Did you hear what was said previous to that remark, "You ought to be ashamed of yourself?"

81 A. Not what immediately preceded it, perhaps; I have told you that I cannot tell exactly the order in which all these different phrases were used; I heard them.

Q. You only a quarter or a half heard the conversation?

A. I should say I heard a third of it.

Q. Neither a half nor a quarter?

A. I think it was probably more than a quarter; I will be liberal and not say a half.

Q. You heard him say that he should insist upon an explanation at one time?

A. I did.

Q. What else did you hear preceding that?

A. Well, I heard his voice very loud and angry.

Q. Can you always judge from the voice whether the person is angry?

A. My judgment is about that of the average human being, I suppose.

Q. I asked you if you can.

A. I think I can when I know the person.

Q. May a person not be indignant and justly so, and speak loudly?

A. Very likely.

Q. Can you distinguish the difference between when anger or indignation prompts?

A. I think I can.

Q. You think you are an expert on that subject?

A. I did not say that.

The defendant came to Clinton in the summer of 1890, about a week before her sister's wedding; Mrs. Kelsey got out of bed the day before and was at the wedding.

Mrs. ETHEL KELSEY EVANS, sworn for the plaintiff and examined by Mr. N. E. Kernan, testifies as follows:

I live in Lockport, New York; I am married to the Rev.
82 Anthony H. Evans, of Lockport; we were married July 31, 1890; I was 23 last March; I know the defendant; I saw him twice before his marriage, once in June, when he came to see the family, and once in August, when he visited there; I was present at the marriage in October, 1888; I sailed for Europe with my father on June 6, 1889; we reached home about the middle of September of the same year; my sister and her husband were at our home in Clinton when we arrived there, and came down to the station to meet us; the first time that I ever heard the defendant use angry language to the plaintiff was on a Sunday shortly after our return; they were in a room occupied by Mr. Atherton across the hall from my room, and I was in my own room reading, with my door open; their door was closed; while I was reading I was disturbed by his voice; it was the first time I had heard him speak; I had heard him a good many times, but this was the first time I had ever heard him speak in that tone of voice; it was very loud and angry, and he seemed to be walking to and fro, because it was farther off and nearer to; I was very much startled, knowing my sister's delicate health at the time, and started toward the door; as I came toward my door, which was open, I heard him say from inside the other door, "You are worse than a dirty nigger in the street;" I went immediately downstairs and called my mother; what he said he said in a very angry tone; I could also hear my sister crying and saying something while she cried, but I could not distinguish any words; my mother came up and went into the room with them; I did not stay within hearing, nor did I hear anything more at this time; I think this was Sunday afternoon, and it was
in the morning that she went to church with my brother and
83 me, and cried a great deal on the way down; this conversation was quite brief because I started out of the room when I heard his voice; I was there the following January, 1890, before the baby was born, when he came; I did not hear anything at all at that time.

Q. Did you see anything, any conduct between him and your sister at that time in January?

A. I did not see them at all.

I returned with my sister to Louisville when she went down on March 15, 1890; I had been invited by the defendant; his mother had also spoken of it when I called on her in Saratoga; I should say, perhaps, a week after we arrived in Louisville, I am not certain of the time—I have it written down in my diary—I heard a conversation between my sister and her husband; my sister and I were going upstairs; the defendant was out in the hall and he came along the hall and followed us up the stairs; he said he wished to speak to his wife, and wished to speak to her before me, and I turned around to her and I said, I had no desire whatever to hear what he said to his wife, and he said that I should hear; so he followed us upstairs and into my bedroom, the room which I described, which was across the hall from the rooms occupied by himself and family; he seated himself on my trunk, against which he kicked his heels occasionally; he began by saying to her that he thought that she had spent some of his money for her family, and that he would not let his hard-earned money be spent on a family that despised him, and she said that she had not spent his money on her family; he said that she was a liar and that she ought to be ashamed of herself; and I said that he ought to be ashamed of himself; the baby cried and my sister went across the hall to the nursery to feed it; the defendant *fendant* and I
84 were left in the room; he said to me that I was not wanted there; that I had a bad influence over his wife; that if I had any self-respect I would pack up my trunk and "git;" I told him that our ideas of self-respect differed; I was sewing all the time on a wrapper for the baby; he said that if I was Brother Kelsey instead of Sister Kelsey, he would throw me out of the window; I said that it was good that I was a woman; then he said, did I consider that I was acting like a lady to stay in a house where I was not wanted; I asked him did he consider he was acting like a gentleman to stay in the bedroom of a guest and talk in that manner; he got up and flounced out of the room; he went downstairs; I followed him out into the hall and saw him go downstairs; I went across the hall to my sister's room; she was quite disturbed; he returned there bringing his father into the room where the baby was sleeping; Mr. John Atherton turned on my sister again by saying, "I am very much horrified at your attitude towards your husband, which is one of rebellion," and my sister said that she considered that that matter concerned herself and her husband, and not him, and he said, "Be careful, young woman, I am here to witness every word which you say," and I said to him, "Very well, I will witness every word that you say;" I was not as frightened as my sister was; Mr. John Atherton said that I had no right in his house, and that I must leave; I told him that I would not leave my sister under those circumstances; then he told me he would serve a summons, or a writ, or something—I don't know what the thing was—and force me to leave the house; Mr.

John Atherton and I were standing at the cradle; I think my sister and the defendant were on the other side of the room; I don't know exactly; my sister said that she
85 would not wrangle over the cradle of her sleeping child, and we must go into the other room, and we started into the other room, followed her, Mr. Peter Lee Atherton and Mr. John Atherton, and I came last; Mr. John Atherton said to me that they were going to talk of things which were improper for me, an unmarried woman, to hear, and that I must leave the room; I must not come in; I asked my sister what she wanted me to do; she seemed very nervous indeed, very frightened, and was crying; she said that if matters of a private nature were to be discussed Mr. John Atherton had no more right there than I had; says I, "Do you mean that you want me to come in?" she says, "I have no one else; I do want you to come in;" Mr. John Atherton turned to me and said, "You do it at your own risk;" we went into the other room; Mr. John Atherton turned upon my sister immediately and said that Mr. Peter Lee had told him the things that my sister had said, and that she was jealous of his mother, and he turned on her and said, "Do you know that you have accused my son of nothing more nor less than incest," and my sister said, "I don't understand you;" then he began to scold her; he called her names; this was Mr. John Atherton; he said that she was low-minded and nasty, and jealous and mean, and not fit to have charge of her baby, and that they would take the baby away from her; she should not keep it; and he wound up by saying something more about this matter of jealousy; then Mr. Peter Lee Atherton, the defendant, spoke, and he said to her, "Mary, don't you remember that down in Tallahassee you sat on the rug in front of the fire and cried, and said that you had done wrong to be jealous of my mother, and that you would not be jealous of her any more," and my sister turned to him
86 and she said, "Peter Lee, will you tell your father what you told me was the cause of your peculiar devotion to your mother?" and Mr. John Atherton said, "What have you been telling her, boy?" then my sister said, "Tell your father what you told me at Tallahassee;" then the defendant began to speak; he seemed confused and embarrassed, and he began to tell his father—he said, "I told Mary that mother was an invalid, and that you were away a good deal, and I had to take care of her and make up to her for your absence;" and Mr. John Atherton said, "Every one knows that your mother and I are a most affectionate couple, and mother is hysterical, and women say in hysterics what they do not mean, and we cannot pay attention to what mother says when she has hysterics;" he then began to talk to my sister, and she said to him, "Peter Lee has his father—well," she said, "Peter Lee has you here. Will you wait and let me send for my father to come and help me?" he said no he would not; then my sister said, "You are cowardly to talk to two defenseless girls like this and I won't stay;" she started towards the door; the defendant seized her by the shoulder and arm after her foot was in the doorway and pulled her back into the room and said, "Damn you, you shall stay;" I did not see her

face, but his was livid with wrath, and I thought he was going to do her bodily violence, but his father interposed quickly and said, "Be careful, Peter Lee;" as soon as he heard his father's voice he let go of my sister; then Mr. John Atherton said again that she was not fit to have charge of the baby and they would take the baby away from her; that upset my sister completely, the idea of taking the baby away, and she began to cry and cried very hard; she seemed very much frightened, and he said he could and would take the baby away from her, and a great deal more of the same;

87 I should think this conversation lasted an hour or more; I could not tell you; it was all the afternoon, it seems, whether it was afternoon or morning; I think it was morning; I said afternoon, but I think it was morning, that the next conversation occurred in the afternoon; while his father was talking the defendant listened and seemed rather pleased to hear his wife scolded by his father in this manner; he said very little, but he looked rather as if he enjoyed it; they threatened once—I won't use that word—they said once—Mr. John Atherton said once that Peter Lee could divorce her and they would take the baby away from her, and then they went out; the defendant made no objections to any of these things that his father had said.

Q. Now, was there anything said at this time by Mr. John Atherton or the defendant about a letter?

A. Yes, sir; that was referred to.

Q. What was said about it and by whom?

A. It was Mr. John Atherton again; he said that he had a letter which his wife had intercepted—I don't think he used that word, but had kept—that my mother had written my sister, and he said that if it was published or made known it would compromise the whole family, and that he would publish it and would let us know what sort of a mother we had.

That is all I remember about this conversation.

Q. In this conversation, when Mr. John Atherton said some of these things—that is, that she was jealous and not fit to have the care of the child, and that he would take the baby away from her; was there anything said about turning her into the street?

A. I think he used that expression once.

Q. What was said?

A. I think he said that he would take the baby away from her and turn her a disgraced woman into the street.

88 Q. What was John Atherton's manner during this conversation?

A. He was not as excited as his son was in anger, but very determined, and his tone was rather fierce and not so loud as his son.

Q. Did your sister, when Mr. John Atherton made this remark as — what his son Peter Lee had told him that your sister had said to his mother, did your sister say anything that you remember as to having been jealous of his mother?

A. Yes, sir; she admitted that she had been jealous of his mother.

Q. Did she say anything further in regard to the accusation as to never having accused him of anything wrong?

A. She said she had been jealous, but she never had accused him of anything wrong; at the time that he referred to their conversation at Thomasville on the subject.

Q. Now, if you will go back a little to the first conversation when Mr. Peter Lee Atherton was alone with your sister and you, and he said she had been extravagant and had been spending his money on her people and she said she had not; did he say he would publish her?

A. Those were his words; that he would publish her in all the shops and stores so that she could not be trusted; he said, "I will publish you in the stores so you won't be trusted."

Q. Now, they go downstairs after this?

A. The two men went downstairs.

My sister was beside herself with fear; she thought they had gone to get some one to take away the baby; she was in the room
89 by the cradle all the time; the child was there; my sister was on the floor down on her knees by the cradle crying; she had hold of the edge of the cradle; no physician was sent for either that night or the next day; I went down and inquired my way to the telegraph office and sent a telegraph to my father asking him to come and bring my mother at once; when I came back to the house my sister was very much frightened, and she asked me to go and telephone for her husband to come up to the house, which I did; he did not come but sent his father; his father came; he saw my sister alone; I was not present; my sister asked me not to be; she said she preferred that I should not be present; they had a talk; that was in the afternoon of the same day; the defendant came up afterwards; they three were together for some time; then Mr. John Atherton went downstairs; that night I was awakened by screams and I went out into the hall and found that they were my sister's screams, and I met Mr. John Atherton; he said, "See here; I believe this is all your fault;" says I, "I have not seen my sister since eight o'clock last evening; it could not be;" we went into the bedroom, and my sister was in violent hysterics; she was all curled up at the bottom of the bed clutching the sheet; she was screaming and exclaiming; she had hysterics badly; Mr. John Atherton ordered her to keep still or the neighbors would hear her screams; this had no effect; I said, "This morning you said your wife was subject to hysterics; what do you give your wife when she has hysterics?" he said, "I give her morphine;" I says, "Go and get some morphine for my sister;" I don't know whether he gave it to her or not; she called for her husband; Mr. John Atherton says, "If you will keep still and calm down, your husband can come up here,"
and she did calm down to a greater degree, and Mr. Peter
90 Lee Atherton came upstairs and I went to bed; the next morning my sister was very much exhausted from the effect of it all, and Dr. Monroe came that morning.

Cross-examination by Mr. BEARDSLEY:

I don't know who sent for Dr. Monroe; the baby was sick that morning; the doctor came to see the baby; I should say it was two

weeks or so after that I went down to Pass Christian and New Orleans with the defendant; I accepted his invitation; he paid all the expenses; we had a very pleasant time; we were gone, I should say, ten days; Mr. Peter Lee Atherton went with me, and no one else; Mr. John Atherton stayed at home with the plaintiff and the baby; I got back safely; after I got back they gave a ladies' lunch; I had a very pleasant time indeed; I have given all the conversation in March that I can remember; I have read the complaint in this case through once; I have not heard it read to me; it has been talked over with me by Mr. Kernen, my sister and my husband; I think that is all; Miss Goodenow was there present; my mother, I think, was not present; I suppose I talked it over half a dozen times; the defendant did not say that I had a bad effect on his wife; the first time in my life that I ever heard the defendant talk angrily was on a Sunday there in September, 1889; I was reading in my bed-room the Bible; I heard his voice and went to the door; as I came to the door I heard this remark, as I stood in my doorway—I was twelve feet off, I suppose—he says, "You are worse than a dirty nigger in the street;" I never heard him say that before or since; I am perfectly certain that I heard him speak correctly; I cannot be mistaken; I did not see him then at all; I never spoke to him
91 at all about him having said that to his wife; I told my mother about it; I spoke to his wife about it some time afterwards, perhaps when I went to Saratoga with her a week or ten days after that; I escorted my sister to Saratoga when she was on her way to Louisville; she met her husband at Saratoga, and I took her down there and came back the next day; she was in a family way then; that is why I went with her to take care of her.

Q. Now, in the conversation there at Louisville which you have described, did you not on that occasion go down from the third story to the second story at night to Mr. J. M. Atherton's room to request the defendant to come up and quiet Mary?

A. No, sir; I did not.

Q. Did Mr. J. M. Atherton come up on that occasion?

A. He did.

Q. Did you again go down and tell the defendant that the plaintiff said she would cease crying if he would come up?

A. I think I did not.

Q. Will you put it any stronger than that?

A. No, I am sure that I did not.

Q. Now, are you sure?

A. Yes, sir.

Q. Nothing of the kind?

A. I am very certain that I did not.

Q. Well, how did the defendant happen to come up?

A. His father called him.

Redirect examination by Mr. KERNAN:

At the time that the defendant invited me to go down South to New Orleans I had a talk with my sister in regard to that invita-

tion; my sister requested me to go down South with her husband at that time.

92 Recross-examination by Mr. BEARDSLEY:

I did not willingly assent; I did not want to go because I knew Mr. Evans would not like to have me.

Mrs. ELLEN GOODENOW KELSEY, sworn for the plaintiff and examined by Mr. N. E. Kernan, testified as follows:

I reside at Clinton; the plaintiff is my daughter; I know the defendant; I remember when she came to me after her marriage in June, 1889; she remained with me during the summer; I remember the occasion of her having a fall; it was in July, as nearly as I can remember; the defendant came there soon after; I had a conversation with him, perhaps an hour or two after his arrival; the conversation was in the library; while he was there at that time I heard him talking in my daughter's room; I was not in the room, but I heard this loud and angry talking; I did not hear what he said; I heard the tones of his voice, which were loud and angry; afterwards when I went into the room I found her agitated; she was confined to her bed or her couch; as nearly as I can remember it was the next day in the afternoon after his arrival; Mr. Atherton was there but three days; I could not hear distinctly what he said; as nearly as I can remember he spent a great deal of time talking to her in that way; I will say half an hour; of course I did not go to listen, neither can I tell how long; I heard it twice while he was there; the other time was at night or in the evening; his tone was just the same, loud, angry and recriminating; I did not hear what he said; I found my daughter once in tears and agitated; I frequently found her so; she was then in delicate health, in expectation of a child; I remember an occasion after that in September,

93 1889, when Mr. Peter Lee Atherton was there; I recollect my daughter Ethel coming downstairs to me; I went upstairs; it was on Sunday; I went directly to the room which was Mr. Atherton's room and which communicated with that of my daughter; I tapped on the door and pushed it open and went in; Mr. Atherton stood in the middle of the room in apparently an uncontrollable rage; my daughter stood leaning against the communicating doorway; she was not crying at the moment, but she was agitated; I walked across the room and sat down; I said to Mr. Atherton, "How can you be speaking in this way, and why is all this talk;" he said, "She has insulted me; she has locked the door between these rooms; I have been insulted again and again in this house, and I will not remain any longer in this house;" in the meantime he was walking up and down; he went into the closet where his clothes hung and took down some garments; he came out bringing some garments; he said to me, "I would thank you to leave this room; I would like to change my trousers;" I said, "I will not;" then he went into the bath-room which communicated with that room, and banged the door; in a moment or two he came out; he then hauled his trunk out to the side of the

room and began to pitch in trousers, coats and things, and he said, "I shall leave this house this night; I shall stay in it no longer;" I says, "No, you won't, Peter Lee;" he said nothing; in the meantime Mary had gone into her room and was in there crying; I don't remember whether the door was closed or not; then I returned to Mr. Atherton and I said, "How can you talk to her in this way, in her condition? do you believe she is with child? do you believe in her condition that she is with child?" says he, "Yes;" says I,
"Do believe that child is yours?" "Yes," says he; "Then,"
94 says I, "how can you act in this way, and how can you talk in this way; no matter what she has said?" I said, "A woman in that condition is hardly responsible," and I still stood there, and I stood there until he was in a measure over this violence; the only reply he made to these questions was to snap his fingers, walk up and down and shake his hands at me and say, "I am insulted under this roof, I am insulted under this roof, I will leave this house;" it is very difficult to state how long this continued; I should think I was in that room ten minutes; he left the next day, I think, I am not sure; my husband came upstairs at that time; I remember of the defendant being at Clinton at the time of the birth of my daughter's child in January, 1890; I remember the occasion after the birth of the child when I heard loud talking by the defendant in my daughter's room, more than once; the first time as nearly as I can remember I heard demonstrations and talking, was within a week after the birth of the child; I can't be sure about that; I cannot say what was said; the tone of his voice was loud and angry; this talk continued for quite a length of time, sometimes half an hour, sometimes an hour; I do not mean that he talked in a continual stream for an hour, that I do not mean, although he was very voluble; but he would stay in her room talking in this way so that the rest of us remained out; the next occasion I should say was at the latter part of the month, about two weeks, perhaps, afterward; I remember the occasion when I went into her room and my daughter was in there; I should think it was about the 28th of January; I cannot be positive about the date; it was the last of the month; Mr Atherton was also in there; my daughter was in her bed; I went into the room;
he was standing up at that moment with both hands in his
95 pocket talking loudly to her; as I went in he stopped, I went along by the bed and there was a chair there and I sat down by the bed and took my daughter's hand; he said, turning upon me, "You have come in here, have you, to protect my wife against me? that is another insult; you have come in here to protect my wife;" I made no reply whatever, but still held her hand and sat still; then he went on talking and saying that she was undutiful or shameful and that he was treated with no respect; he was treated with no respect by any member of the household, beginning with his wife, and it was insulting for me to come there, and he would thank me to leave the room; I did not go; I said to Mary, "Do you wish me to stay?" I think that he said something to her about it; her reply was, "Unless you can keep still" and still she held my

hand gripped tight and still I sat there, Mr. Atherton walking up and down; the reply, "Unless you can keep still," was to him; I don't recall anything else that was said except the universal talking; my daughter was very pale and agitated, not crying all the time; she held my hand hard and looked as any sick woman might; his tone and manner was that of a man uncontrollably angry, domineering and recriminating; his tone of voice was loud and angry; in a very few moments my husband came to the door and opened it; he came in; he had just come from the college; he said; "This talking has been going on too long; you shall both of you stop it, and it must stop;" he spoke with more emphasis than usual; thereupon Mr. Peter Lee Atherton went out of the room—dashed out of the room, slammed the door and disappeared from view; in a moment or two I followed him; the defendant went into
the small room across the hall, which he was occupying at
96 the time; when I went out into the hall he had dragged his trunk out over the threshold, and he said, "I shall not stay another night under this roof; I shall not stay another night under this roof," and he was throwing his things into the trunk; that continued a moment or two; I went downstairs directly and he came downstairs; I live at Clinton; my husband is dead; my daughter, Mrs. Atherton, and her child reside with me; a maid servant and a man servant are with us; my children spend part of the time with me; I have a young son; he is away at boarding school; this is also his home; my daughter, Mrs. Atherton, has had her home with me since she left Louisville, and this has been the home of her child; she takes care of the child.

Cross-examination by Mr. BEARDSLEY:

Prior to Mr. Atherton's coming to Clinton in 1889 I understood that he thought that he had not been kindly or properly treated by some one of our family; I have never known the defendant to snap his fingers on any occasion but that of anger or nervousness; I heard this loud, angry voice twice during the three days he was at Clinton; it was never less than half an hour; I did not time it; when he asked me to leave the room I did not go; when I was in the room I heard him tell his wife that she had locked the door between the rooms, that she had insulted him by doing it; he told me that he wanted to change his trousers; I did not go out of the room; I can recollect nothing more that occurred on this occasion than I have already detailed; I do not recollect how long after her confinement it was that my daughter sat up; I think the defendant should not have been in his wife's room many times when he was; if you wish me to
say that I think he never should have been in the room I don't
97 say it; I — there were times when he should not have been there; I *say* manifested no displeasure when he stayed when I thought he ought not to have stayed; I thought it was unreasonable; it was dissatisfaction on my part rather than displeasure; I heard the defendant talk loudly when he was not in the room with my daughter once; I never observed that when he was interested in a subject he talked very loudly; I should say he did not because

there were times when he was very gentlemanly, and talked in a very ordinary tone of voice; the second time that I have mentioned as having gone into my daughter's room, and he asked me to go out, was in January; I heard him say to her then that she was undutiful and treated him with disrespect, or insulted him; his talk was insulting; in fact, he remarked that we all had insulted him; I think he said that we had insulted him, that we all had, or the family had, from the beginning to the end; I think that was the remark; that was what he claimed; he did not use any violence to me or my daughter on that occasion; by violence I mean personal or physical violence; I have given all that occurred on that occasion as well as I recollect; in October, 1891, when my daughter left the defendant, she went first to Lancaster, Mass., to visit my sister; from Lancaster, after she had remained there a while, she went to Lockport; from Lockport to Louisville; from Louisville back to Lockport; from Lockport to Lancaster; from Lancaster she went to New York; she was not in Clinton at all in the winter of 1891–'2; my house was then in the hands of people who were taking care of it; I went back and forth during that time; I spent some weeks there; my daughter went for the first time to Clinton after leaving Louisville in October, 1891, in May, 1892.

98 Redirect examination by Mr. MILLS:

In the winter of 1891–'2 I did not give up the oversight of my house; I was in it quite late in October; I went away, and went back and stayed two weeks, I think, and again in the spring; I looked after the place and paid the servants; I went back and occupied the house, opened it in May, 1892; that has been my home ever since, and was my home and place of residence all the time; we have occupied the house since 1881; we lived in Clinton two years prior to that in another house.

Recross examination by Mr. BEARDSLEY:

I was in court yesterday when my daughter was requested to look for letters of the defendant; I have not those letters with me; my daughter is not present; she is taking care of the baby.

A. LEIGHT MONROE, M. D., sworn for the plaintiff and examined by Mr. William Kernan, testifies as follows:

My occupation is that of physician at Louisville, Ky.; I have resided there seven years and nine months, practicing medicine; I know Mrs. Peter Lee Atherton; I became acquainted with her shortly after she married and moved to Louisville; I attended her at that time in the year 1890; the first record I have is March 19, 1890; she was then at Mr. John M. Atherton's, Louisville, Ky.; I called on the baby on the 19th; my first visit to Mrs. Atherton was on the 22d of March; I found her in a very nervous and excited condition; I made an examination to ascertain the cause, questioning her very closely, and could see no physical cause for her condition; my prescription on that occasion was simply a sedative to quiet

her nerves; I could detect no physical cause for her condi-
99 tion; I questioned her as to her physical symptoms and found none, and then I asked if she had had any mental worry or excessive fatigue, or any special drain on her vital powers, and she said she had had a good deal of trouble and a good deal of worry, but on that occasion she did not, if I remember correctly, tell me what the nature of it was; I called on her again on the 30th of March; I found her in a similar condition; very nervous, very much excited and hysterical, a very rapid pulse; I was satisfied from her previous condition and from the effect of my remedies prescribed at the first visit that it was from the same cause, and gave her a similar prescription; she had no physical disease or trouble that I could discover; I never could discover any physical trouble; she was delicate but healthy; I called on the baby on the 15th of May and prescribed for plaintiff at the same time; I don't know what the plaintiff's condition was at that time; I don't remember anything about that prescription; it has been three years ago; I called on the baby on the 16th of June and prescribed for Mrs. Atherton again; I don't remember her condition at that particular time, but all of the prescriptions during that time were for similar conditions, and I think, perhaps, an identical remedy; I did not call on Mrs. Atherton any more until the fourth of November of the same *same* year, 1890; I think I remember her condition at that time; it was in the evening if my memory does not fail me; I wouldn't be absolutely sure; it was in the evening late; I found her in bed, and she was in the same condition, only perhaps more so, that I had found her in before; I asked her in reference to what had happened to her or what she had undergone, for the purpose of learning the cause of her trouble; she informed me of her
100 ailment and how she felt and all about it; I made a prescription; the next record I have is in December 4th and 5th; the visits on December 4th and 5th—both days, I made two visits, and those were the only occasions that I ever saw her twice a day, and the condition then was an acute trouble, a condition of indigestion, that had no reference that I could see to her other trouble; I have a record of a visit to her on the 11th of December; I don't remember how I found her at that time; I only know that the only occasion that I found her with any physical trouble was on the occasion each day for two days, December 4th and 5th, 1890; the condition in which I found her on these occasions other than the two, was one that would have become serious eventually; judging from the condition I found her in, if the cause had continued sufficiently long, it would have seriously injured her health in my opinion; the next time I saw her was in the fall of 1891, at the Galt house, in October; I knew nothing about her having left until I was called to see the baby, and she then told me that she had left her husband; her condition was then very similar to those that I had found her in previously; she was tearful and hysterical, very nervous and exceedingly depressed; more a condition of depression than excitement; in my opinion there was not any physical disease or trouble that would have caused that which I discovered; I was not told of any physical symptoms; the symptoms were all objective; I prescribed for her

several times during her stay there of a week or ten days, and always for this condition.

Cross-examination by Mr. BEARDSLEY:

After Mrs. Atherton came back to Clinton I prescribed for the baby a number of times in January, February, March and April,
101 1892, while the baby was in Louisville; I went to see the baby every week; I did not prescribe always; that was by an arrangement at the request of Mrs. Mary Atherton; I was requested to call and see the baby each week and write her its condition; the plaintiff is a person I should say of rather excitable characteristics, emotional, affectionate temperament, not under ordinary circumstances excitable that I ever saw; I have always seen her under extraordinary circumstances; she was nervous when excited; I never saw her when she was not excited; either she was sick or the baby was sick; I presume that she got better from the nervous and hysterical effect under my treatment, because I was not sent for again; Mrs. John M. Atherton sent for me to visit the baby occasionally from January to May, and I went; most of the time the child was in ordinary health, sometimes ill as other children are, never seriously.

Q. When Mrs. John M. Atherton sent for you, that you considered a professional call made at her request?

A. Well, I don't know how to answer that, because I had been requested by the mother, a request to which Mrs. Atherton acceded, to call each week whether I was sent for or not.

Q. But when outside of the regular weekly call, Mrs. John M. Atherton sent for you, whether or not you considered that a professional call at the request of Mrs. John M. Atherton?

A. Yes, sir; she did on one occasion, possibly two; more in reference to the baby's diet than any sickness.

Redirect examination by Mr. W. KERNAN:

I was requested by Mrs. Mary G. Atherton to go there and see the child once a week and report to her at Clinton; outside of
102 these regular visits I don't know how many times I went to see the child; it was once, probably twice, I think not oftener; it was then in reference to the child's diet.

FRANK P. LAIRD, M. D., sworn for the plaintiff and examined by Mr. William Kernan, testifies as follows:

My occupation is that of practicing physician in the city of Utica; I have been practicing for thirteen years; I know the plaintiff and the child; I have attended the child professionally; the first time I saw the child was in September, 1891, and the second call that was made at Clinton was in June, 1892; when I called in June, 1892, the child was suffering from muco-enteritis, what is commonly called catarrhal dysentery, which is an inflammation of the lining membrane of the bowels, produced by indigestion; I attended her during that trouble and have had charge of her ever since; she is a delicate child; she is a pale, delicate child, of a very delicate, nerv-

ous temperament, markedly subject to irritation of the stomach and bowels—that is, subject to indigestion from slight cause; she requires great care and supervision, especially as to her diet, and that is the main point; her mother has been in charge of her when I was there; I think she has had the very best of care; I think her mother is perfectly competent to give her all necessary care; I think the surroundings of the child as to climate and atmosphere are conducive to her health; it is one of the best places to be found where the child is located.

Plaintiff rests.

103 PETER LEE ATHERTON, being sworn and examined by Mr. Humphrey, testifies as follows:

I was born in Larue county, Kentucky, and have never resided in any other State than that of Kentucky; I have resided in the city of Louisville since September, 1873; at the time I was married to the plaintiff she knew that I lived in the State of Kentucky, and knew that after the marriage her home was to be in the State of Kentucky; I was married on the 17th of October, 1888; at the time of my marriage I was suffering from the effects of nervous prostration, which followed a long illness of typhoid fever occurring several years before; I was out of health without being quite a permanent invalid; after we were married we came first to Utica and stayed two days and nights I think, then went to New York city, remaining there a week, then went to Old Point Comfort, the Hygeia hotel; the only definite plan we had was to get home before Christmas; Mrs. Atherton left Old Point Comfort while I was there, going to New York city, with my assent; she left on Tuesday night, expecting to stay in New York city Wednesday and Thursday, and return Thursday night, to reach Old Point Comfort Friday morning; she did not return on Friday morning; I met her on my way home at Charlottesville, Va.; the weather was extremely boisterous along the Atlantic coast at that time and I had communicated with her and asked her to meet me at Charlottesville, she coming from New York with my father; we came from there to Louisville.

With reference to the conversation that has been detailed between myself and Mrs. Atherton as having occurred in January, 1889, I will say, I was lying on the rug in my own room in front of the fire; I was feeling badly that day; it was late in the afternoon;

104 Mrs. Atherton came into the room about that time from her own room and made some remark about how I felt, and I told her I felt very badly, that I was a good deal discouraged about myself; I said to her that I wished she had been contented to remain longer at Old Point Comfort, that during the first two or three weeks of our stay, especially the first two weeks, she doubtless remembered that I improved very rapidly and was very much encouraged; that she remembered that she then became restless, and I said, "You know you first wanted to go to Baltimore, and then abandoned that idea and then went to New York for a day or two to see your aunt, and I gave my consent to that, and you did go and did not return as expected, and the arrangement was made to

meet you at Charlottesville;" that if she had been contented to have remained there quietly with me that I thought it would have done me a great deal of good; I did not in the conversation say to Mrs. Atherton that she was a vain, unloving woman and only cared for my money; nor did I make any statement similar to that; about the middle of February Mrs. Atherton and I went South; while we were in the South Mrs. Atherton requested that she be allowed to go back to Clinton that summer, the summer of 1889; I made no objection to her going back, and then the conversation turned on plans for the summer; I said, "I don't know that I will go with you, or that I can go with you, because of the feeling which I believe your mother and aunt have for me, which knowledge I have derived from your own statements to me about what they have said to you;" the subject of going back to Clinton was referred to again by her at Thomasville, Ga., where we went from Pensacola; I may be allowed to state that I do not pretend in these interviews to give the exact language used, but I will give the accurate sense of what was used, and in most cases the
105 words employed; she said to me, "You said the other day that you could not go back to Clinton, or that you felt that you could not go back, because of the feeling which my mother and aunt had expressed toward you; my mother was very fond of you in the beginning, when she first knew you, and I will tell you what first caused her to change her opinion of you and to lose her respect for you;" she said that her mother and herself were in the room of my mother in the cottage in Saratoga in the summer previous to our marriage; my mother was lying on the bed; I came into the room and lay down on the side of the bed by my mother and put my head on her shoulder; then she, plaintiff, immediately left the room and went upstairs and took off my engagement ring and threw it across the room; that she was greatly shocked at such an exhibition on my part, and that her mother expressed herself as also being much astonished at it; that she told her mother what she had done and how she felt when her mother came upstairs, and that her mother said to her, "If you feel that way towards this man you ought not to marry him;" she then asked me if I did not remember asking her at different times if there was not some change in her feelings toward me before she married me; I told her I did; she said that was the beginning of her change of feeling; that from that hour she began to lose respect for me; that any man who would do that, lie down in that way by his mother and put his head on her shoulder—and especially in her presence—she could not sustain the same feelings towards that she had previously; that conversation was continued between me and my wife for some little time; in the course of the conversation I became very earnest and very indignant, and as to part of the conversation very angry; when I first began to express indignation she went still further with
106 statements as to what had been my conduct toward my mother; she said she thought she was justified in her feelings on that subject; she pressed this matter still further, and I

became then very angry, and I said to her that my relations with my mother were perfectly within the rules of all good propriety, and were dictated by feelings of affection for my mother alone, that my relations with my mother in no way conflicted with my relations toward her; that my love for my mother in no way conflicted with my love for her as a wife, and I thought her view on that subject very unnatural and were views that I had never heard expressed before by anybody; the conversation continued some time and she finally admitted that she did not then feel as she felt before the marriage and as she had felt immediately after the marriage, and that she thought that her mother would feel differently about it, and that she would never make any further criticisms of my relations with my mother, and asked that the matter be then dropped; that she had brought it up, in the main, to explain her mother's feelings towards me before the marriage, and hers, and immediately after the marriage, and that there would be nothing more said by her and no more criticisms made by her on that subject.

I told her that after what she had said to me at Thomasville, that I would be willing to go back to Clinton with her; she then asked to go, or said she would like to go along in June some time; I assented.

The next conversation on that subject occurred at Pass Christian, Miss.; she told me that since our last conversation about her going to Clinton she had been informed that her father and sister expected to sail for Europe about the 1st of June, and that she would like to go home about the middle of May to see them before
107 they sailed; I assented; a few days after this she asked me how I would feel about taking the house at Clinton, for the months of July and August, as her father and sister would be in Europe, and her mother would probably want to make a visit to her aunt, and that she would like very much to do some housekeeping in the old home; that she did not know what her parents' ideas would be about it, or what the details were, but that probably it would be to take the house without any rent, paying the running expenses of the place; I told her I thought it would be a very pretty idea, and that I was entirely willing to do so; at that time I had a correspondence with Prof. and Mrs. Kelsey with the result that a definite arrangement was made, that I and my wife should take the house during the months of July and August, 1889; this arrangement was definitely made while we were at Pass Christian; this was about the 1st of April.

Mrs. Atherton and I returned to Louisville about the 20th of April; in May, 1889, there was an examination made of me by a physician, with the result that the analysis showed that while I was not in a dangerous condition, there were symptoms which might soon be dangerous; when the first arrangement was contemplated, of Mrs. Atherton going to Clinton in June, I expected to go with her and remain during the most of the summer; when she asked to go in May instead of June I said to her that if I went with her then that I could not remain during the entire time, that my business, when I was able to attend to it, would require me to be in Louisville during the month of May and the early part of June; that I

would go to Clinton with her about the middle of May, remain three or four days, or as long as I could, return to Louisville and come back to Clinton the first of July; Mrs. Atherton said to me
108 that she thought that was a very good arrangement, especially as the house at Clinton would be full during the month of June, which was the commencement month of the college, and for the further reason that the climate was sometimes unsettled during the early part of May, at Clinton, and that it would probably be better for me to be in Kentucky; after the examination made of me by the physician in May, 1889, I had a conversation with Mrs. Atherton, in which the subject was brought up; I was in my room about 9 or half past 9 o'clock at night; my room up on the third floor of the family residence; I was getting ready to retire; Mrs. Atherton came upstairs from the second floor; I had heard voices talking on the second floor, but could not distinguish anything that was said; she looked very much out of humor; the first thing she said to me, as nearly as I can recollect, was, "When there is anything to be said to me about your health or your condition, I wish very much you would tell me yourself without having your father tell it to me;" I replied that I did not know that he had told her anything, or that he was to tell her anything; "Well," she says, "he has—he has just told me of the analysis which has been made by your physician, and says that he thinks that it will not be best for you to go to Clinton at this time;" I replied that I did not know that my father intended to say anything to her about it; that I had seen the analysis that day for the first time, and I intended to speak to her of it myself; that I was somewhat alarmed at what the analysis showed; that while there was no cause for immediate apprehension, that it meant that if these conditions continued that it would be most probably followed by Bright's disease; that I myself thought under the circumstances that it would not be best for me to change climate at that time, and to spend two nights on a sleep-
109 ing car very close together, because I expected that I could stay only two or three days in Clinton; that I thought I had better not go to Clinton; that some arrangement would be made about her going on, even if my father had to take her to Clinton; she replied, very petulantly, that it looked as if that was always the way; that I was unable to do anything which she had her heart set on doing; that she thought it looked very badly for a young wife to return home for the first time after her marriage without her husband; she made no reference in any way to what had been said about the seriousness of my condition by my father, or what this analysis meant or might mean—no reference to anything that I had said to her about it; all that she had to say was that she expressed disappointment at my not being able to go home with her to remain a few days; I was very much hurt at this exhibition of unfeelingness, to say the least of it, on her part; I said to her, "I think you are approaching this subject in what I would say almost a heartless manner; I had supposed when you learned my condition, or what might be threatened, that I would at least have some sympathy from you, or that there would be some apprehension expressed on

your part. Now you have nothing to say whatever except that you regret that I cannot go to Clinton with you; that I can never do anything that you want me to do, and you seem very much out of humor and in a temper about it instead of any sympathy with your husband in his condition;" there was some considerable conversation followed; I said to her that as long as she remained in that frame of mind, or seemed to evince that disposition about matters pertaining to my health, that never again would I say to her one word with reference to myself or any danger that I might be
110 in, or would I allow any one else to do it with my consent;"
I did not say to her she was a false and unnatural wife and ought not to be married, in the way in which it is expressed in the complaint; I said to her that I thought she took a very unnatural view of the marriage relation or of the feeling that ought to exist between husband and wife, that she had a very unnatural feeling not to express more sympathy for her husband in that condition; I am not positive, but I may have said that I thought that a woman that felt in that way on that subject ought not to be married; I did not say that she should not come back if she went to visit her parents, or anything of that nature whatever; I did not at that time or at any time seize a pistol and brandish it; I did not at that time or at any time ever seize a pistol or brandish it, or threaten the plaintiff during our entire married life, nor did I ever during our married life threaten the plaintiff with any bodily harm; I had no conversation whatever with Mrs. Atherton in the month of May, 1889, in regard to a letter which was opened by my mother, a letter from Mrs. Kelsey to Mrs. Mary Atherton; the first time I ever had any conversation with the plaintiff on that subject was, I think, some time in the fall of 1890; Mrs. Atherton said to me that she had several times had reason to think that a letter written by her mother to her had fallen into other hands; I told her that was the case; this interview was perfectly pleasant; there was no anger expressed on either side; I told her that in the spring of 1889, a few days before her return from Pass Christian, Miss., a letter had come to her, addressed to her in Louisville, and had come to our house and had been opened by mistake, and that it was found to be from her mother to her, but not until a considerable portion, or some part, of the letter had been read; that it was not a letter which I thought any mother ought ever to have written to her
111 daughter, and that if its contents were generally known it would be very discreditable to her mother; I never said anything to her at any time in regard to publishing the letter, and never threatened at any time to publish the letter; that letter was never referred to in the presence of my mother, either directly or indirectly; in May, 1889, before Mrs. Atherton went to Clinton, I suspected her condition; it was not definitely known by any one; I heard Mrs. Atherton's testimony given in this case in reference to my brandishing a pistol, and in reference to her going out of the room and my saying, "May the thing that is within you die;" I never made any such statements, nor anything that could have been construed in any way into such a statement; I made no ref-

erence at all in this interview to the fact that she was probably to become a mother; Mrs. Atherton went to Clinton about a week after this interview; I remained in Louisville at that time and about the 10th of June I went with my father first to Denver, Col., and then to Manitou Springs, Col.; at the time Mrs. Atherton left Louisville I said to her I expected to get to Clinton by the 1st of July; it was not until after Mrs. Atherton left Louisville for Clinton that I arranged to go to Colorado; while I was in Colorado there was a continual correspondence between myself and Mrs. Atherton; while I was in the West I received several letters from Mrs. Atherton in reference to the circumstances of our marriage; I have not these letters; my best recollection on that point is that those letters were destroyed in the fall of 1890, I do not recollect whether in the presence of Mrs. Atherton or not—my impression is not; one of these letters was received at Manitou Springs, Col.; in regard to the matter now in hand I have in mind two letters particularly bearing on it; one of these I received at Manitou, and the other in
112 Chicago; the second letter was written as soon after the first one as a letter written by me in Manitou Springs, Col., could go to Clinton, N. Y., in the usual course of the mail; I don't know the exact date of the first letter; its receipt was about the 20th of June, I should say; the next letter was sent by Mrs. Atherton to Colorado Springs, and forwarded from there to Denver; I had left Colorado Springs in the meantime to go to Chicago, and the letter was forwarded from Denver to Chicago, and was received by me early in July; my best recollection is that I saw those letters in Louisville in the fall of 1890; I have no distinct recollection of having seen those two particular letters even at that time; there were a number of letters received from my wife destroyed at that time; my best recollection is that these two letters were among the number, although I am not positive; I have already furnished in this trial two letters received by me from my wife during the time we lived together; these are the only two letters which I have in my possession, except a letter written during the summer of 1891; the two letters to which I am now referring are not either of these; two of these letters which I have were found by my father in the secretary last spring in the house at Louisville; I have no other letters except these three from my wife; I have examined to see.

By the COURT: You may give the contents of the letter.

The WITNESS: In the first of these two letters she said that she was misinformed as to the condition of my health at the time she was married, and that she believed it was done intentionally, or words to that effect; I don't give the exact language; I cannot state what I wrote her in reply; I replied to it, and I received a reply to that reply.

113 Q. What were the contents of that letter?

A. In that letter was stated as nearly as I can recollect it in these words—and my very definite recollection is that they were the words quoted—that she did believe deception was purposely employed at the time of my marriage to obtain her consent.

That letter was received by me in Chicago when I was coming East from the Colorado trip; my father was with me in Chicago at that time, I replied to that letter.

Mrs. Atherton having reached the court-room, a recess was taken at this point until 1.45 p. m., for the purpose of examining the letters of the defendant.

The witness resumes: The four letters now handed me are in my handwriting, sent by me to the plaintiff, who was at that time my wife; they are the letters which were produced at the request of my counsel this morning.

The counsel for defendant offered the four letters in evidence; the counsel for the plaintiff objected as incompetent and immaterial; that the letters to which they were a reply, or written in answer, do not appear, or the substance of them.

By the COURT: He has given quotations from two letters which he states that he sent; I don't know what these letters offered contain; the counsel states that they were offered for the purpose of explaining whatever was complained of at the time he came to Clinton when he was met by Miss Goodenow at Utica, and your evidence tending to show that he did not seem concerned about his wife or something of that kind; they say these letters are offered for the purpose of explaining that interview and the conduct of the defendant when there.

114 Mr. MILLS: We have not got her letters to which these are in reply.

By the COURT: The evidence is that those letters are lost and he has given the contents relating to a particular subject. I think I will receive them.

By the COURT: A conversation or a course of conduct is detailed by the wife. Now, what was said upon that subject, either by word of mouth or by letter, that tends to show the feeling; to explain the attitude of the husband; it seems to me would be competent. My notion of a case of this kind is about this: that in order that a husband or wife is guilty of cruelty or cruel and inhuman treatment of the other, that it is not necessary that either should pound the other over the head. That you can kill in another way just as effectually; and the husband can be killed as well as the wife. What I have said now applies to one as well as the other. Neither does it indicate cruelty to say—perhaps it does not—to say at times harsh things. That may be the result of passion. In order to ascertain whether the one or the other is guilty of cruel and inhuman treatment; made up, as I have suggested, of these words and acts going through a series of months or years, it seems to me that before you can properly interpret those acts—their meaning or their intention—that the court should know what the lives of these parties have been. It may not be a very cruel thing for a wife to call the husband foolish, or a fool, or something of that kind, on one occasion, but if you find by an examination of their lives that they really love each other and that they really live harmo-

niously together, no court would give much attention to the expression. But if we find that that is an expression used habitually to indicate hatred and contempt of the husband by
115 the wife; to humiliate him or her; to break his heart, if you please; if you find by the course of life of the parties that that is the purpose, that means another thing. Now, it seems to me, that before we can properly ascertain what the real condition of things is in this household—the household that was—we ought to find out what the real lives of these parties were. Whether these things, if they were said, were said for the purpose of injuring; for the purpose of wounding, harming; or whether they were said as the result of some other cause. If a husband strikes his wife repeatedly that does not need any explanation. That is cruel and inhuman. Now, so far as the letters which she wrote to the defendant are concerned he says that he has destroyed them. She can state what they were, so far as she remembers, in explanation of these letters. So far as the plaintiff was concerned it was my intention not to confine you to what was in the complaint, but to let in all that you deemed important as having occurred between these parties. If you complain of a certain act it would be competent for him to give his explanation; that is, what he said to the party; what induced him to say it. If it was written at such a time as not to have been made for the purpose of an explanation I think I will receive the testimony.

The following letters written by the defendant to the plaintiff were here received and read in evidence:

"DENVER, COLO., *June 17th*, 1889.

"MY DEAR MARY: I found your letter of 11th this morning and I am very sorry to hear that you had been so unwell; I also regret that you seem to have so entirely misunderstood the spirit and purpose of some of my letters; I regret that they have given you
116 a moment's additional pain or have caused you a tear; I am sorry for this, because if these letters have done this, and this only, I fear they have not accomplished the sole purpose for which they were written; I have written nothing with any feelings of unkindness or even harshness, nor in any spirit of momentary resentment or temper; there is a far graver question involved than any which could arise from any momentary pique or ill humor, even if such did exist, which is not the case. Since we have been married you have said a number of times that you and your family were deceived by myself and by others as to my health at the time of our marriage; I have been again and again arraigned, sometimes directly and again indirectly by you, for my partial and temporary loss of health, and told by you what contact with my state of health meant to you as my wife; and this coupled with the statement that you were brought into this contact by deception. These reproaches, unjust and unkind as they were, I endured for months, thinking they would certainly cease, until further forbearance could do neither you nor myself any good. When you left Louisville last

month I did hope and believe that such feelings had passed out of your mind, and there would be no more expressions of them. In that event the past would never have been alluded to again by me. But you had been only a few days at Clinton when you began writing on the same point and in the same spirit. I wrote you then plainly, but always lovingly, trying to induce you to cease these unkind reflections and never renew them; I wrote these letters, not because I could not bear such reproaches, but there could be such a thing as the repetition of injustice and unkindness until all respect, at least, for one who persisted in such a course would be destroyed, even
117 though that person was a woman who had been devotedly and kindly loved and, in all truth, worshiped.

"Your affectionate husband, P. L. A."

"MANITOU SPRINGS, COLO., *June 30th*, 1889.

"MY DEAR MARY: Yours of June 25th received, and in this I will reply to what is expressed in one sentence in that letter. Before doing this I wish to make a personal statement.

"I married you with the full knowledge of what I was doing and saying—married you solely because I loved you, and I have loved you ever since. I was personally responsible for all I said and did, and for anything that was said by any member of my family, at the time. From the hour I met you to the present one I have acted in all of my personal conduct toward you as an acquaintance, as my promised bride and as my wife, entirely on my individual responsibility. No one has endeavored to influence me in the slightest degree in any of my conduct or relations toward you. No one has wished to do so, and if the attempt had been made it would have been useless; and it is unjust to me, and worse than idle for you or your family to hold any one else responsible for a single act or word of mine. I hope this is clearly understood.

"You say in the letters of 25th: 'As to the charges of deception we had best say nothing.' This in reply to my letter from Denver, and taken in connection with the insinuations you have several times made, is, to say the least of it, evasive. I have never believed you meant these intimations as your true feelings, or that you fully recognized what was implied by them. This construction has certainly influenced me in my treatment heretofore
118 of this matter. I will now ask you the direct question. 'Do *you* believe, in your heart, that any deception was practiced by me, or by any of my family, in order to obtain your consent to the consummation of our marriage?' In reply I want a plain, categorical answer, 'yes' or 'no,' and I will accept none other. In answering this question I want an expression of *your own* honest, deliberate and personal feelings. I want you to divest yourself of any and all outside influences, and answer it from your own conscience, wife to husband. I say this because I am aware, from your own lips, that this charge of deception has been insinuated by your family; and I wish now to say that if the charge has been made it is absolutely false, by whomever uttered or from whomsoever it

emanates. I sincerely regret that your family should entertain such an opinion of me, but *their* estimate I can endure without much discomfort. In this matter I am now dealing directly and only with you, and *your* opinion I must now have.

"If you were deceived into marrying me then your marriage vows were extracted from you by fraud and by falsehood, the two factors which make up deception, and on them your part of our marriage was based. If such are your true feelings I want now to know them.

"Your husband, —— ——."

"DENVER, COLO., *July 11th*, 1889.

"MY DEAR MARY: I leave tonight for Chicago on my way East. I did expect to stay in Denver a little longer to give the climate a fair test before leaving Colo.; but I struck the hottest spell of weather known here for years. My time here is too limited for me to go back to the mountains to avoid the heat and still further try the effects of Colo. air. The result of the heat and the ensu-
119 ing rainy weather has kept me indoors, and in consequence I do not feel so well as I did a week ago.

"I had expected to have a reply to my letter of June 30th before this, but so far have received none. I shall leave instructions to have my mail forwarded to Chicago, where I shall stop for rest and to hear from you in reply to above letter.

"I will not restate what was written in that letter, nor restate the points involved in the charge of deception; that charge must be disclaimed or sustained; it goes directly to my character as an honest man; it cannot be evaded; it must be fairly met and met now; it is entirely separate and distinct from any question of love or affection; if you have not sent an answer when you receive this, you can do so and direct your letter to me at Richelieu hotel, Chicago; if you have sent a reply addressed to Manitou or Denver it may save time if you will repeat or rewrite the substance of your reply to me in Chicago; it is a painful duty to thus insist on a reply to such questions as asked you and on such a subject, but however painful, my duty to myself and to you compelled me to ask you these questions in my letter of June 30th, and however painful to you and whatever your answer may be you must do your duty by answering them. Truth, justice and fairness demand a definite reply to that letter. We are both of responsible age. We are supposed to know our feelings and should not deceive each other in any matter so serious as the one fully stated in my letter. While I had known more or less of the insinuations and reflections on this subject, for some time past, I could not have the heart to connect you with their authorship nor conclude that you accepted or believed them; but when you refer to the matter of deception, presented by me in a previous letter and say 'on this subject we
120 had best say nothing,' you virtually affirm the charge. Now, you must openly avow it or positively disclaim any such feeling or belief. No use to delay nor to attempt any evasion. While I am glad to hear from you and to read any message of kind-

ness, this matter of deception, which really goes to the very moral obligation of our marriage and to my position as your husband, cannot be covered up by anything else.

"Yours affectionately, P. L. A."

"CHICAGO, *July 16th*, 1889.

"MY DEAR MARY: Your letter of July 6th received, forwarded from Manitou to Denver and from the Albany to this house. I am sorry to say your letter has not done much towards any adjustment of the difficulties in our way. I will try to reply to the several important points in your letter, and I will follow chronology rather than the order in which you state them. You ask, 'Why this persistent attack on you?' I have made no attack. I have tried to overcome the troubles needlessly encountered in our married life, with the hope of removing from the future much, if not all, that has been unpleasant in the past. Let me remind you that it is very easy for any one to make charges and complaints, and then ask, 'Why this attack?' when any efforts to refute the charges are honestly made. The one who is forced to defend is not an aggressor in such defense. There is *not* today a trouble between us that I originated; not a single charge instigated by me. You know this. But I am to bear all through life any charge, any assault that you or your family choose to make, bear them without a word, lest I may be leading an 'attack' on you in resenting or in explaining. I am to be arraigned on questions
121 involving my integrity by word and deed, and if I answer in my own defense, as even a criminal is allowed to do, I am met with the charge of 'attacking.' I cannot be prevented, by any such pretense, of doing my duty to myself and to you. In the next place you ask, 'What was my purpose in writing the letters I did write?' This I have partially answered in a former letter. Some letters were written to defend myself, as said above, from unjust and false accusations. But, as I wrote from Denver, I had hoped to do more than this. I hoped to exclude all that was unworthy of you and of our married life from the future. I hoped to forever drop the curtain on some of the scenes and acts of the past, of which you have so often repented, face to face with me. So long as you entertained the views and encouraged the feelings that led you into these unfortunate expressions and unfounded charges, so long as the same influences controlled you, there could not be much prospect of a change in the future. As soon as you reached Clinton in May your letters revealed the existence of the same feelings that had so often made such serious and inexcusable trouble in the past. To be perfectly plain as to my 'purpose,' I have this to say: I intend to live, so long as I am spared, a self-respecting life. I will not quarrel or wrangle with my wife. I will not lead a life that lowers me and necessarily lowers my wife. Peace, love and ordinary kindness and humanity shall not be shut out of my life. The enjoyment of these indispensable pleasures is made impossible if our marriage rests on fraud, if my impaired health is to be called a crime, if I am to make myself offensive to my family (who have *never* by word or deed done

you any wrong) to gratify your demands. I will not violate every accepted rule of honest, manly, and conscientious manhood
122 to satisfy any human being. I have never in writing any letter been 'forgetful.' I have never for a minute been wanting in tenderness towards what, in you, was worthy of tenderness (for your *truer, better* self I have *yet* the same feelings I have always had); nor have I written one word for which I want to ask 'forgiveness.' I hoped to bring you to a comprehension of the life I wanted and intended to lead in the future, and to let the past go forever. I have believed and believe now that your mother and your aunt have influenced you largely in your course. I know much of your mother's advice to you from your own lips, and from what she has said to me and from what I have seen. I speak from positive facts. I had hoped your mother's regard for you and for your future would induce her to change her course in this matter. To this end I have referred to her relation to our troubles. You may say, you have said, that my parents, first it was my mother and then both of them, have interfered in our lives and tried to cause you unhappiness. Here is another question of fact. The facts stand and cannot be controverted, that never since the hour of our meeting have either of my parents said or written an unkind word *to* you or about *about* you, or given any advice to me intended to influence you or me in our married life. From time to time they have advised me as to what to do for my health. Some of this advice I have adopted, some I have rejected. As to any statement of my mother I absolve you from all secresy to her as to anything she ever said. She probably thought it *was* not best for me to go from Old Point to N. Y., and may have said so. But her advice had *nothing* to do with my following you to N. Y. When you left O. P. *you know* I told you that I would under no circumstances come to N. Y. Here are a few more facts
123 which you have admitted, and must admit now. You had your mind poisoned against my mother before our marriage. You went to Louisville with your mind worse than poisoned. You misconstrued everything she said and did. You told me you never hated any human being as you did my mother, because you believed she disliked you, and because she stood between you and happiness in our married life. You tortured yourself all winter with the idea that she wanted to make you unhappy, and, as you said, 'when you looked through green glasses everything looked green.' Were you last winter in any frame of mind to put a fair meaning on anything she said or did? I give you credit for *believing* she *did* want to make you unhappy, and that she did dislike you. But you were made to believe what was false then; you were made to do yourself and her a cruel wrong, and you have passed again under the same influence. Until you are willing to believe my statements as to any influence as to my conduct, until you will recognize proven facts, until you hold me and me alone responsible for what I do and say, we can arrive at no understanding, even if the most serious matter I now come to is settled.

"As to the matter of deception, charged by your family, to obtain

your consent and their consent to our marriage, you say you do not believe *I* deceived you, but that my father, mother and Dr. Bodine 'purposely' deceived both you and your parents. Here is a plain reassertion of the charge. *I* am exculpated, but *you* remain the victim of deception. *I* did not, *by fraud*, obtain the consent of your parents and of yourself to become my wife, but others did. So our marriage rests on deception, purposely practiced, though I am not guilty. If you are my wife by reason of deception, no matter by whom practiced, you should not be morally bound by the
124 contract. If your statement is true, I hold you as my wife because deception was purposely and successfully employed to deceive you. *I* married you because I loved you, as I called on Heaven and man to witness. *You* married me because you were the victim of deception. This is what your letter says, and nothing else can be made of it. *Is such a contract fair to you?*

"The statement that either one or both of my parents or that Dr. Bodine 'purposely' deceived you or your parents as to my being 'very ill' is absolutely false in a double way. They *did not* 'purposely' or otherwise deceive you or your parents, and I was not then and am not now 'very ill' in health, in the sense in which you use the term. The authors or author of the statement deliberately manufactured the charge to make trouble between man and wife, and between child and parents. Let me ask you a question. Why and for what purpose did my parents deceive or try to deceive you or your parents? Was it to assist me to win your love? You professed to give me that love in the time we spent together in St. Augustine, and I believe you did give it to me. Was it to obtain your promise to marry me, which you gave me in June at your own house? The engagement was made before my father come to Clinton, and was announced to him when he entered the house. You and your family saw me then sicker than I have ever been since typhoid fever, much sicker than I have been since last June, and the date of our marriage was then fixed, as I understood, with your parent's consent. Your old family physician was called in to attend me in June, and you and your parents could have gotten from him a diagnosis of my case. Was this deception practiced to secure your consent to the solemn marriage ceremony? You and your parents saw me in Clinton in July, again in August in Saratoga, and
125 in September in Boston. You saw my father and mother only in Saratoga from the time of our engagement until I came on to be married. Just before I left home to be married I was sick a good deal the same as in Clinton in June, only the attack was less acute, with acute indigestion. Your father met me and my father at the train and went to the hotel with us, saw me there and saw my exact condition. I was quite weak from the journey, made while fighting indigestion and taking very little food, and you and your parents were told all this and knew it and talked of it. You knew I spent a good deal of the day I was married lying down, because of my temporary weakness. I was strong enough that night to stand up before God and man and to take you as my wife and had strength to do little else. In a few days I was able to go to N. Y.,

to go around a good deal in N. Y., and then go to Old Point. I had no serious organic illness or disease when I married you, have none now, have had none since that day. Since I was married I have never been 'so ill' as when you engaged yourself to me; while I have not, except for the few months I was in Florida, been a perfectly well man since I had typhoid fever, there is no reason why I cannot again be a well man. Dr. Bodine has always said and says now that this was and is true. My parents believe it, and but for the mental worry I have been forced to endure I would doubtless be far better than I am today. During the first two weeks at Old Point I gained every day, and at Pass Christian you know how fast I improved and you also know what was the great reason. But again, why do you think my parents or any friend of mine wanted to deceive you or your parents? My parents did not object to my marrying you, nor did they encourage it. They left me free
126 to act. They had nothing to gain from my marriage to you except what they would have had if I had married any other girl. They expected to love the girl I married and hoped she would love them. Otherwise it was of no great interest to them one way or the other. The most astute lawyer could conjecture no reason why my family or my doctor or my friends should wish to deceive you into marrying me. So I say the authors of this charge must have concocted it for the sole purpose of making trouble between you and me and between me and my parents. It is a false, malicious charge, and whenever made will be branded by me as such.

"As I have said above the kernel of my question, why did you marry me? Did you marry me because of deception? remains unanswered. I want you to ask yourself these questions; upon your conscience and your God. Ask your heart. Has anything made your marriage vows mere 'words and form'? Why are you today my wife?

"I want to see you alone, and these questions must be settled when we are by ourselves. I want to be with you a few days before going to Clinton and I want you, on receipt of this letter, to write me at what day and at what place in Utica you will meet me and we will go at once to Richfield Springs for a few days. I will leave here on the 'flyer' and reach Utica at 1.50 p. m., and we will go that p. m. to Richfield. I wrote you last Thursday night from Denver telling you I was coming here. I will come as soon as I hear from you time and place of meeting.

"YOUR HUSBAND."

The witness resumes: After I had written the letter dated
127 July 16, from Chicago, I received a telegram from Mrs. Atherton that she would meet me in Utica, naming the time and day, as I think, two days in the future; at the same time I was informed that my mother was in Saratoga, N. Y., almost at the point of death. After getting this information, I telegraphed Mrs. Atherton, before getting her telegram, that I had left Chicago that day for Saratoga; before getting to Utica I received a telegram brought on the train at Syracuse; I believe the telegram was signed

by Mrs. Kelsey, saying that my wife had had a bad fall and they feared serious results; I got off the train at Utica and was met by Miss Goodenow and Robert Kelsey; as soon as I could get something to eat we got a vehicle and drove to Clinton, which is nine miles from Utica; when I arrived at Clinton I saw Mrs. Atherton; she was in bed; I went at once to the bed and took her in my arms and she put her arms around me. I doubtless had a conversation with her that afternoon; I also had a conversation with Miss Goodenow the same afternoon; to go back a little, while I was in the West I wrote a letter to Mrs. Kelsey, the plaintiff's mother, from Chicago, just before I left there.

In the talk that afternoon with Miss Goodenow on reaching Clinton, I said to her that I had come to Morningside, which is the name of the place at Clinton, under peculiar circumstances; that when I received a telegram from Mrs. Kelsey, as I now remember it to be signed by her, at the time I received that I did not expect to come to Clinton until after I had seen my wife, and that I did not know whether I would come to Clinton at all, but that when I received that telegram, of course, every other consideration was dismissed; my first impulse then was to get to my wife as quickly as possible if there was the danger threatening which might follow a fall of that kind; this is what I said to Miss Goodenow; I
128 also told Miss Goodenow that I thought it was kind in her to come in to Utica to meet me; that I had been under the impression for some time that her feelings towards me were not friendly at all, and that I thought under the circumstances that it was very kind of her to come in; I also said to her that I had written a letter to Mrs. Kelsey, which was mailed from Chicago the day I left to go to Saratoga, and that this letter had not been received; I said I presume when Mrs. Kelsey receives it, it will make her very angry; that is another peculiarity of my coming here at this time; that if it had not been for this telegram about my wife's condition, I should not have come here until Mrs. Kelsey received that letter and had a chance to reply to it by correspondence; I said nothing of the kind to Miss Goodenow that I would not have come except for appearance's sake.

I am quite positive that whatever conversation occurred between Mrs. Atherton and myself the afternoon I reached there was about some little matter about the place, or about the fall, or about her condition, or something of that kind; the next day, as I recollect it, something was said about the correspondence which had passed between her mother, Mrs. Kelsey, and myself while I was in the West; Mrs. Atherton said I ought not to have written to her mother as I did; I said I didn't think that her mother ought to have written to me as she did; especially with reference to the agreement that I had made with her father about the place; that the agreement was made by me with him in good faith, and that I intended to carry it out; I reminded her in that conversation that I had written to her from Louisville, when my Colorado trip was planned, that if I should be delayed in reaching Clinton for any reason a few days beyond the first days of July, which was the time arranged

129 that we would take the place, that she should assume for me the running expenses of the place from that time forward, and that I did not think that her mother was justified in writing to me that if I did not intend to come to Clinton at all, why didn't I write and tell her so, and that she would write to Prof. Kelsey that she would cancel the arrangement, or that she had better cancel the arrangement, and that led to some further conversation as to her mother's relations and mine, and she said that the place belonged to her mother, and her mother could make any change in the arrangement that she chose to; I said I didn't think that was material at all, as to whom the place belonged to; that the place belonged to her father, and it was not a matter of concern enough to raise the question of ownership about; this matter of deception was also referred to in a conversation with Mrs. Atherton; I don't remember whether it was this conversation or the next day, but it was during the two or three days I was there; there was very little said about this: I said to her that she understood I had asked her to meet me in Utica; that she knew the contents of the letter I had written her from Chicago, and that I did intend to press for a definite settlement of this question of deception at the time of the marriage; that I had intended to do that, but that in her condition at that time, of course, I couldn't do it and wouldn't do it; I did not say to Mrs. Atherton that her mother was no lady; in that conversation, as I recollect it, I displayed some indignation, or possibly it might be called some temper, when I was talking about the letter that her mother had written to me in Colorado, and some impatience when my wife said that she thought that anything that was written to me in that way I ought not to say anything about, if it could be helped; I think I reached Clinton on the 18th of July; I
130 stayed in Clinton two or three days, until I saw that my wife was out of danger, and went to Saratoga and stayed there three or four days, until I saw that my mother was out of danger, and went back to Clinton and stayed there until about the 25th of September, or the *the* latter part of September, with the exception of one or two short visits made from Clinton to Saratoga while my mother was sick; one day while I was in Clinton I was talking rather loudly in my room, or in my wife's room next to it, about something; she spoke to me about my loud tone of voice, and said that Ethel had heard me, that I had talked so loud that Ethel had heard me, a few days before, call her a little nigger; I replied, "Now, Mary, you know that I did not call you a little nigger; that if I did use the expression 'little nigger,' it was in illustrating something that I was talking about." "Now," says I, "why didn't you do me the justice to tell her, if she referred to the matter at all, just how that word was used?" I said, "Now, I think that is very similar to many of the things that have caused a great deal of trouble between me and your family; the things that I have said to you are repeated to them, or they might hear them, in some discolored way, and form their opinion accordingly; I did not at that time, or ever, speak of Mrs. Atherton as a nigger or a negro, nor did I ever say to Mrs. Atherton at any time that she did not make herself as attractive

in bed as a negro, nor anything that could be tortured into anything like such an expression; in Clinton in August or September I had a conversation with Mrs. Atherton in which I said something to her about her treatment of my mother during the first winter after we were married; I told her that I thought she ought not to have treated my mother as she did during the period I have just stated—
131 namely, the first winter we were in Louisville; that I thought what she did was at the time entirely without cause, and that I thought she treated her at times very unkindly; she replied that I ought not to say anything to her about unkind treatment of my mother, for I had written a letter to her mother for which I ought to have been kicked out of the house, and if her father had been at home when it was received I would have been kicked out of the house; I suppose I exhibited anger on the occasion of that conversation; after a few minutes Mrs. Kelsey came in; I told Mrs. Kelsey what Mrs. Atherton had said, and I told Mrs. Kelsey if that was the kind of feeling—that I ought to be ignominiously kicked out of the house, no matter what I had written—Mrs. Atherton had seen that letter—that if she had that feeling towards me I thought I had better get out of the house, and that I would take my trunk and leave, and I proceeded to do so; I got my trunk out and packed it; that was the occasion that Mrs. Kelsey referred to when I requested her to step out of the room because I wanted to change my trousers; I was in some kind of a negligé suit, and I wanted to put on a traveling suit, and I requested Mrs. Kelsey would she be kind enough to leave the room so I could change my suit, and she refused to do it, and I went into the closet which opened out of my room and changed my clothes in there; I did not say to Mrs. Atherton that her family were vile and nasty; I did not leave the house; I did not say that her father was a deadbeat, nor did I say in the sense in which it has been used here, that her father was a will-breaker, or that he was a dirty, lazy slouch; in one conversation, referring to business matters, when Mrs. Atherton was talking about my father, saying that she thought he ought to pay more attention to family matters and look after things
132 about the place more, or go with my mother to more places than he did—she being very angry at the time that she said this—I said, "If your family had made the money they have by hard work instead of by breaking of a will I think they would have more appreciation of a business man's life, and why he did not do some things that he was sometimes asked to do;" as to the remainder of the question I deny it; I did not say that her father was a dirty, lazy slouch; I did not at any time say that while I and my father were in Colorado that we had remade our wills, cutting Mrs. Atherton off from every penny of the property; I never used the word "divorce" to Mrs. Atherton during our married life, nor did I say that I would be glad to see her poverty-stricken and penniless, or that I would wait until the baby was born before divorcing her; I said to her at one time that summer, when I started to leave the house on one or two occasions, that if it was not for her condition, or that some matters between us would have to

be settled, I would go away from there and stay away, but that until the baby was born I would let things go as they were; I did not at any time say to Mrs. Atherton that she was lying to me; nor did I ever call her a liar during the entire course of our married life; nor did I at that time shake my fists in her face, or brandish my fists near the bed; my usual manner, so far as I know, when I am either earnest, very much interested about anything, or when I am angry, I am generally on my feet; if I am talking earnestly about anything in which I am not angry I am nearly always on my feet, and frequently use my hands a good deal in making gestures; I have a habit of using my forefinger in trying to emphasize something; I never shook my fist at Mrs. Atherton, or in her face; in regard to a circumstance that occurred in Clinton that summer, in
133 which Mrs. Atherton locked the door, I remember something about it; I know we had a little tiff about something one day, and she locked the door between us; that made me mad, I know, but there was very little said about it; it did not impress itself very forcibly upon my memory; it soon passed over, and the door was very soon unlocked; nothing of any serious nature at that time that I remember of; I did not say, "Don't you dare to lock the door against me;" nor did I say that she was a shameful woman, that she was low and mean and bad as a nigger, or worse than any nigger in the street; I told her that I thought she ought not to lock the door against me in a spirit of anger in that way; she was angry when she locked the door, and I was angry, too; from Clinton I went to Saratoga, and from Saratoga I telegraphed Mrs. Atherton to come on over, either the next day after I got there or the following day, and she and her sister Ethel came over to Saratoga; her sister, I think, returned to Clinton the next day, or the second day, certainly, and in two or three days Mrs. Atherton and myself went to New York city and stayed there about a week, and went to Louisville; I left Mrs. Atherton there and went to Saratoga, N. Y., and she telegraphed me that she intended to leave Louisville and to meet her in Utica; I telegraphed her not to leave Louisville until I returned; I would be home in ten days at the outside; she repeated her telegram to me that she wanted to leave then, and wanted me to meet her at Utica; I again wired her not to leave until I returned, giving my reason for it; she, a third time, repeated the telegram that she intended to go anyhow, and I then telegraphed her that I would meet her at Utica; I did meet her there, and went to Clinton with her; as nearly as I can recollect she left Louisville the 25th of October, 1889, and reached
134 Utica the next day; I was in Clinton at Thanksgiving, and stayed there three or four or five days, and came back there again about the 1st of December, and Mrs. Atherton went with me to Saratoga to see my mother, who was still there, and we remained in Saratoga four or five days and returned to Clinton; from Clinton I went to New York city, and was there about a week; from New York city I went to Louisville and remained there a few days, and came back to Clinton about the 3d of January; I had a conversation with Mrs. Atherton that night and remember a good deal of

it; I told Mrs. Atherton that I thought it a little peculiar under the circumstances that I should find the house full of people; that I thought she ought not to have been confined to her room or ought to have been assigned to a room as small as the room she had, in her condition, in the third story of the house; that the room was perfectly comfortable, but it was very small for her to take any exercise in, and that it was not exactly in accord with my idea of propriety that there should be young men there at that time, even though they were the brothers of her sister's fiance; I did not say to her that she did not love me, or that if so she would have arranged a better place for me; I made no complaint of the room that had been arranged for me that night; I was to occupy that room with her, and as for my own account for that night I made no complaint or criticism; I asked Mrs. Atherton where we were going to stay, what was going to be the arrangement until the child was born; she said she was to go, as soon as these young men left, into the front room downstairs, and that I was to have the room which was at the rear of the house, removed from the room that she was to occupy some little distance; I told her that I didn't like that; I reminded her that she had always begged me when the time came that she was to be confined that I should come and be with her, be right with her and do all that I could for her; I said to her, "If you are to stay in one part of the house and I in another I don't see that I can be of much comfort to you up to the time that this occurs; I cannot be with you at night, and I don't think that you or I either have been treated with the proper kind of respect, with you in your condition at this time, to have had this arrangement made, if that is where I am to stay"—while it was one of the most comfortable rooms in the house—"that I think I had just as well go down to New York, when I have business, and stay there until the birth of the child, and if I am needed then, or when the child is born you can telegraph me and I will come back;" she then began to cry very bitterly, and said I ought not to say anything about what her father and mother did about the arrangement of the room; that she did not like it herself, that she would have preferred to have had me with her, but it could not be arranged in that way; I repeated I thought I might as well go to New York, and she repeated that I was very cruel and unkind to her, and she cried very bitterly; I did not say that she was impure; I did not say she was immodest; I said I thought it was somewhat immodest for men, one of them was a grown young man of twenty, to be in the house at that time; that it was rather an immodest way to have things arranged; I knew that Miss Goodenow was in the next room to ours that night; I did say that Miss Goodenow had been put there as a spy.

By the COURT: Upon this occasion, before going to that—two days before the child was born—did you say anything to your wife about separating from her?

A. I did not.

Q. Anything of that kind?

136 A. I never said anything pertaining in any way to divorce to my wife.

Q. Well, did you in substance say, two days before her child was born, that you would leave her?

A. No, sir; I did not.

Q. That you would separate from her?

A. No, sir.

Q. Nothing of that kind?

A. No. sir.

By Mr. HUMPHREY: Was there any conversation at that time, Mr. Atherton, and if so give it, which would be construed in that way?

A. Not two days before the child was born; the night I reached there, there was a good deal of conversation on the point as to how the family treated me with regard to what was known to be my wishes; that I wanted to be there with her at the time, and my recollection is that that led to some considerable talk on both sides.

By the COURT: When was that with reference to the time when the child was born?

A. That was about January 2d or 3d; that was the night that I first reached Clinton; the child was born on the 8th.

By Mr. HUMPHREY: Was anything said that night by you to Mrs. Atherton in regard to your divorcing her or separating from her?

A. Nothing in regard to any divorce, or of any permanent separation, any more than my going away from Clinton and staying away from there.

Q. For how long did you threaten to go away from Clinton and stay?

137 A. To go to New York and stay there until the child was born; if I was wanted, to then come back and stay while I was needed and then go away from Clinton.

Q. Mr. Atherton, do you recollect the circumstances that happened the third night after the child was born, your going into Mrs. Atherton's room?

A. I do.

Q. I wish you would give that circumstance.

A. I was in my own room across the hall in bed; the nurse, Miss Sheldon, came to my door and knocked, as I remember, about 11 o'clock, I am not positive as to the hour, but it was soon after bedtime, and said that Mrs. Atherton wanted me to come into her room; I got up, put on my dressing gown and slippers and went into her room; she said to me, "Laddie, I am very nervous and don't believe I can go to sleep tonight, and I want you to come and get in bed with me for a while and I think probably I can go to sleep;" I took off my dressing gown and slippers and got into the bed; Mrs. Atherton was at the time bandaged from her shoulders practically down to her knees; one of her bosoms at that time was hard; we were afraid of a cake there, and she was bandaged around here (indicating) as well as other places; when I got into bed she came right over into my arms like a little child, and when I put my arms

around her and drew her up to me, of course, I felt those bandages and I said, in a pleasant way, "Well, you are a regular little old mummy, aren't you?" she says, "I am bandaged from head to foot," or "from my head to my heels," something like that; I am not positive, but I think something was said by one or the other of us as to a drug-store smell, in a pleasant way; there were a good many antiseptics: she went to sleep in a little while there in my
138 arms; I lay there; I did not go to sleep for a long time; after a while she woke up and turned over and said to me, "Poor old Laddie, I don't think you are going to sleep much, and you had better go into your own room so you can get some sleep;" I said, "No, if I can be of any comfort to you in any way I will stay here; it doesn't make any difference whether I sleep or not, and I probably will go to sleep," and I did go to sleep; about 4 o'clock in the morning, or towards morning, she woke me up and said that either the baby was to come to her or Miss Sheldon, or there was some reason, and that I had better go into my own room, and she raised up and kissed me and I went into my own room.

Q. Have you detailed that whole circumstance as well as you are able from beginning to end?

A. Yes, sir; I recollect it very distinctly on account of the nature of it.

There was a nurse there, Mrs. Neary she is now, Miss Sheldon she was then; I did criticise her on account of her untidy appearance about the room; I saw, four or five days after the birth of the child, dressings which she had used for Mrs. Atherton—she sustained some slight injury at the time of the birth of the child—in the grate, which dressings I said ought to have been immediately destroyed when they were once used and taken off; I immediately built a fire in the grate and burned them up; I spoke to the nurse about the temperature of the room; the temperature of the room was, in my opinion, kept all the time, or nearly all the time, too high; very frequently I would find the temperature of the room at eighty, and often between eighty and eighty-five, and once I remember as high as eighty-eight; I was called one morning about 4 o'clock by the nurse, who said that Mrs. Atherton had a nervous chill; I went into the room; my wife immediately said that she had had a
139 chill, was very cold, and that she thought I had had a good deal to do with it, because I had turned the steam off from the register; I had turned the steam off of the register, without the knowledge of the nurse or Mrs. Atherton, to try to reduce the temperature of the room, intending to turn it back on; I had repeatedly done it without their knowledge, because it was the only method I could successfully pursue to lower the temperature of the room; at that time I forgot to turn the steam on; I expressed very great sorrow and regret at having done so; I immediately looked at the thermometer; it did not feel cold to me; I saw that the room was sixty-six; I either made it myself or asked the nurse to make immediately a fire in the grate, which was done; I did not say anything to Mrs. Atherton in regard to her not having the baby in bed with her, nor did I say that even the beasts of the field loved their young more

than she did, nor did I say anything to Mrs. Atherton in regard to her not loving her child; I said I thought that it was exactly right that the child should not be kept in Mrs. Atherton's room except when it was necessary; the child was kept in the nurse's room, in the cradle which Mrs. Kelsey told me was used at the time my wife was born; I did have a conversation with Mrs. Atherton somewhere about the 25th, 26th or 28th of January in regard to the possibility of an operation being performed; the conversation was either just before or immediately after lunch, and my best knowledge and belief on that subject is that it was just before lunch; I went to Utica on the two o'clock train; it was the day before I expected to leave; the conversation began by some reference to the possibility or probability of an operation having to be performed, Mrs. Atherton having sustained at the time of the birth of the child a slight
140 laceration, which was not discovered at the time—not discovered until a day or two later; she said to me, "If it is necessary that this operation should be performed, I would like to go to New York to have it done by an old physician and friend of the family, Dr. Fordyce Barker, and if I am to do that I would like to remain in Clinton until the proper time comes for the operation to be performed;" I said to her that I did not think she ought to do that; that Dr. Ford had said that no operation might be necessary; that if it was necessary it could not be performed until May at the earliest, and probably not until the child was through nursing, but certainly not until May; I said to her, "I want you to come to Louisville as soon as you are able to travel; you have now been away from Louisville, and much of the time from me, continuously since the middle of May, with the exception of two or three weeks which you spent there in the fall;" I said to her, "I am very much better now, and it is a very busy season with us, and I must go to Louisville as soon as I can attend to my business, and I want you to come to Louisville as quickly as you can, and when the time comes to determine upon this operation, if it is necessary to be performed, I would be very glad and very much prefer that you have it performed in Louisville if it can be properly done there; there is a physician in Louisville of national and international reputation, Dr., Yandell, whom you know, and he is one of the finest surgeons in the country, recognized as such, and I think he could properly perform that operation, from the man's reputation; now." I said to her, "this is raising another question which may keep you away from Louisville for two months after you would be able to come with the baby; you will probably be able to come by the first week in March; the child will then be two months old, and if the weather is such from the first
141 to the middle of March that you can travel probably you will be able to travel at that time, and it will be safe for the child, and I don't want any question raised now about your continuing to prolong your stay away from Louisville if it can possibly be avoided;" I was a good deal irritated at raising another issue which would involve her continued absence from home; I said, "If you stay until May that will make a year now that you have been away from Louisville with the exception of two or three weeks;" in the course

of that conversation I did not say anything about divorcing the plaintiff; there was considerable conversation about it—she still insisting that she should go to New York to have it done and should remain in Clinton, and finally she said, "Well, I am simply going to New York and have it done and you may come there if you like;" I said, "If you go to New York without any reference to my wishes and without any consultation, if you are going to take matters now in your hands and run them"—and I was quite angry then—I said, "You can go to New York and I will not come there; if you are now going to handle your own case without any consultation with me, or any respect at all to my wishes, when you go to New York you can pay your own expenses;" I was very angry at the time; I was very indignant at her raising this question of continued absence; I did not say to Mrs. Atherton that she was false as a woman, nor unnatural as a wife, as it is alleged there; I probably said during the conversation that she had a very curious and unnatural view of married life; I cannot say that during this conversation I was angry—I was not angry until the latter part of the conversation, when I became a good deal irritated by her saying
that she would go to New York without any consultation with
142 me; at that time she had gotten irritated, too; I did not shake my fist over the bed, nor make any personal demonstration of anger; I may have been walking up and down the room; I think Mrs. Atherton cried a little just at the last of the interview; this talk occurred before noon; I went down to lunch and then went immediately to Utica; I saw Mrs. Atherton again about twenty minutes past five, having in the meantime been over to Utica; I went into her room and kissed her, as I always did, and sat down on a chair a little way from the foot of the bed, but where Mrs. Atherton would see me; I had just started the conversation with her; she was not crying at all; she was in bed at the time; during this conversation Mrs. Kelsey came into the room and went right to Mrs. Atherton in the bed and said with a good deal of emphasis, "Mary, you must not have any more conversation now that is going to make you any trouble or make you cry again;" I said to Mrs. Kelsey, "I don't think it is necessary for you to come into the room to protect your daughter against me, or anything I may say; if that is the purpose for which you have come in I wish you would withdraw; it is not necessary;" Mrs. Kelsey then turned to me and said that I had talked to her daughter in such a way that she had cried all the afternoon, and Mrs. Kelsey seemed to be very angry, and there was some little conversation between her and myself, and Mr. Kelsey came into the room and said that he thought this was all very bad for Mary and thought that my presence there was retarding her recovery; I said, "If that is the case I will leave at once, for I don't want anything of that kind; you have neither of you given me any chance to say anything about the conversation which occurred
which you say made Mary cry; I did not say anything to
143 her for which she ought to have cried all the afternoon, and am extremely sorry if she did," and I started to tell them what it was, and I don't remember just what was said then; some

more rather angry words passed and I went into the nurse's room, which was adjoining Mrs. Atherton's, the room which I had occupied previously to the birth of the child and my trunk was then in the closet and I carried it out into the hall because the baby was in the same room.

Q. You say some more angry words passed. Angry words between whom?

A. Between Mrs. Kelsey and myself and Prof. Kelsey and myself.

Mrs. Atherton was not at that time joining in the conversation; after a little while I went downstairs; assembled in the room below were Mr. and Mrs. Kelsey, Miss Goodenow and myself; I don't remember everything that was said; there was a conversation of some length; I remember a few things that were said; the fact was referred to that there had been a good deal of friction in our married lives—trouble; I remember Mrs. Kelsey saying to me that I had said some very unkind things to her daughter; I told her that I had doubtless said things in more or less anger; I had said a great many things in a spirit of honest resentment and indignation, and I said Mary had said very many stinging things to me; I said that on one occasion I was lying on the bed in Thomasville; I was quite unwell, and that Mrs. Atherton said to me something about that she wanted me to go somewhere or do something, and I was not able to go, and she said to me that it was pretty hard to have married half a man, and doubtless my reply to that was something pretty hot or something angry, the result of wounded feelings; the result of that conversation was that I remained in Clinton that
144 night, and we went in to supper; I saw Mrs. Atherton again that night; she was somewhat tired; I think she had cried a good deal that afternoon; when the interview finally ended, her mother said, "Well, go upstairs and kiss Mary," and I did; I went upstairs and I says, "I don't know whether we have done any good particularly or not; we have had quite a talk downstairs and we are all right now for the time being;" in the conversation downstairs I had narrated what I had said to her in the morning about wanting her to go to Louisville and what I said to her about the operation; Miss Goodenow, and I think Mrs. Kelsey, said that as soon as Mary got well she would go to Louisville; Miss Goodenow said, "It is her duty to go to Louisville;" I said, "Miss Goodenow, I don't want my wife to go to Louisville with me or do anything else for me from duty; I recognize duty, but I think there is something else in life besides mere duty;" I left Clinton the next day; I went to Saratoga to see my mother, who was still there; I returned to Clinton in two or three days, reaching there in the morning and leaving the same afternoon for Louisville; I bade my wife an affectionate adieu when I left; I remember it very distinctly for this reason: that if it was not the first time that she had sat up it was among the first times, and when I bid her good-bye she was sitting up in the chair with the little baby right across her lap; I remember the fact very well that she had her hair down; I left there just after dinner, and when I came up from dinner—that is, dinner in

the middle of the day, she was in this position and she had her hair down over her shoulders, and I thought it was one of the most beautiful sights I have ever seen; I knelt down in front of her and kissed the child and then kissed her good-by and went away; I think Mrs. Atherton reached Louisville on the 16th of March; her sister and the baby and the nurse came with
145 her; I met them in Cincinnati and went with them to Louisville; Miss Ethel Kelsey had been invited by me to come to Louisville and pay a visit; when I met my wife at Cincinnati I doubtless first took the baby and kissed it and then kissed her; it was the first time I had seen the little child for some time; one morning, about the 21st of March, it was about that time, I don't remember the exact date, the child was not very well, and the doctor was sent for; while the doctor was coming upstairs Mrs. Atherton says to me, "You must not remain in the room while the child is being examined, because it is a little girl baby, and it would not be proper for you to remain in the room;" as soon as the doctor had left I said to her, "Now, Mary, in your remark to me that it was not proper that I should remain in the room while the child was being examined, because it was a little girl baby, sounds very much to me like bringing up again the same kind of criticism of my actions with regard to this child that you made about my actions with my mother and my personal conduct toward her after we were married; you made these criticisms afterwards;" I referred to what she had said about my putting my head on my mother's shoulder in Saratoga; "now," I said, "if my relations to my daughter, whether she is as she is now, two months old, or whether she is ten years old, are to be questioned; if I am to be subjected by you to criticism as to what I do with her anywhere or at any time, it will absolutely put an end to all happiness in our married life; I cannot and will not be subjected by anybody on earth, even by you, to such criticisms in regard to propriety, which are to me almost horrible, first with my mother, and now with my own little girl;" I
said, "I think for a Christian family, living as you have lived,
146 that you and your mother, in criticising my relations with my mother, and now your saying what you have about this little girl—have the strangest ideas of propriety of any people I have ever known;" she says, "Yes, it seems our ideas of propriety do differ, because my father and all the servants at the home before I left Clinton were talking about how strange it was that you, three or four nights after the birth of the child, should insist on coming into my room and staying in bed with *be*;" I said to her, "What on earth do you mean? Is there covered up in that a horrible insinuation? If there is not, there is nothing in it;" I said, "From this hour there will never be any intimate relations between you and me as husband and wife, because if I am to be betrayed by a thing of that kind what can I do in the future," and I turned around and left the room; a short while afterwards Mrs. Atherton and her sister were coming up the steps; I said to Mary, "I want to see you for a moment;" she says, "I don't want to have any conversation with you;" says I, "I have something that I want to say to you,

and I will say it right here if necessary; I have told you that I didn't know what allowance would be sufficient for you, and that for the present the allowance would be discontinued, and that you can go and buy anything that you want for yourself and for the little child, and have the bills charged to me and I will pay them; now, since you have said to me what you have this morning"--and I don't remember whether I said I was going away, but I was going away—"I don't want you to go and make any bills and to be spending my money; I don't want you to buy anything now;" she said to me, "I have got to have things; why don't you want to give them to me?" I said, "Because of the way you have talked to me this morning;" during that conversation I have no doubt that my voice and my tone and manner ex-
147 pressed the very deepest indignation and possibly anger; she would not listen any further on the steps, but went upstairs into her room—she and her sister; I followed, because I had not finished saying what I wanted to about that matter, and her sister, when I came into the room, said, "I don't think it is very gentlemanly for you to come into a lady's room when you are not invited;" "Well," I said, "possibly not, but I don't think it is very ladylike in my wife to refuse to hear something that I want to say to her; if she had granted me the interview I should not now have been in here;" she asked me to withdraw from the room; I said I would when I had finished saying what I wanted to to my wife; I then said that I did not feel that I wanted her to spend any of my money while she was feeling toward me and had talked to me as she did that day; some further little conversation occurred there and I left the room and went into the room where my little baby was in the cot and stood there looking at the child—crying, in fact, because I intended to leave the house and go away; I started down the steps, and I met my father at the head of the steps; he went into the room where the little child was, and as he went in the door—Mrs. Atherton could hear him then—he asked me to come in too, and I went in; he then repeated in there what he had stated to me outside, saying to her in our presence that he had heard this talking and he came up to see if he could do anything; that he had never interfered in any way or intermeddled before between myself and my wife, but that he did not feel that he would be doing his duty to himself or to us if he remained silent there in the house any longer when he might do any good; that he was the older man, the father of one and the father-in-law of the other,
148 and that he loved her, and now what was this all about; what was the matter this morning. I told him what she had said to me, both about the propriety of my remaining in the room and about what her father and the servants had said about my coming into the room at Clinton three or four nights after the child was born; about that time her sister came into the room; almost immediately after she entered the room, or in a minute or two after that, my father said to her, "I came up here to have a talk, a serious talk, with Mary and Peter Lee, and in the course of that conversation some matters of a very private and personal

nature may be discussed, and as you are a young unmarried girl some matters may be talked about which I don't think you would care to hear or ought to hear, and I would request you to withdraw," and she refused to withdraw, and she said then, "I will go out if my sister wants me to;" I think she turned to her sister and her sister, either by word or by gesture, indicated that she wanted her to stay; my father then said, "Well, I don't intend to be deterred from saying what I want to say or what I think I ought to say by the fact that you will not leave the room; now that I have asked you to go and you will not do it, if you hear anything which is unpleasant, or not exactly befitting the ears of a young girl you are entirely responsible for it;" he then went on to say to Mary how much he regretted that any trouble should have come up; he then said, "Such things as you have said to my son this morning"—he first asked her if she had said these things and she said, "Yes," about the child and about my coming into the room soon after the child was born, my coming into the room and staying in bed with her; he said, "Such things as that are bound to cause trouble between man and wife, and you must not expect Peter Lee to have things of that kind said to him—you could not expect
149 any man to have things of that kind said to him—without exhibiting great anger and indignation and that he should show great resentment when such things are said to him; those questions of propriety in family relation are things that nobody will be dictated to about, or nobody will be allowed to criticise; he then said to her, "I have only a short time ago learned from my son, because up to a short time ago he had never said anything to me about any trouble between you and himself—why you felt toward my wife"—my mother—"as you did the first winter you were here before you went South, and particularly then, and he told me what you told him in Thomasville as to what occurred in Saratoga when you took off your engagement ring and threw it across the room;" I don't remember at just what point during this conversation it occurred, but Mrs. Atherton said—my recollection is that it was soon after the conversation was begun—"If there is going to be this talk we must not talk in here, because it will awaken the baby," and then she and her sister went into the connecting room, and my father and myself went in after; the conversation was continued in there; I do not pretend to state just what part of it—what words were said in one room and what in the other, except that we went in soon after the conversation began; he said, "Now, Mary, instead of that causing any trouble—the fact that Peter Lee loved his mother or showed his affection for her in any way should have caused any trouble is almost incomprehensible to an ordinary thinking person; there is nothing incompatible, nothing that conflicts between the love that a son bears for his mother and that which the same son as a man bears for his wife, and why in the world should you object to any particular personal demonstration, whatever it might be,
150 of Peter Lee towards his mother; it seems almost incredible that this should have occurred; now, I know it was not in your mind that you should have been jealous of his mother in any

way for anything that he did;" he did state to her that I had told him that Mrs. Atherton had said to me that she was jealous of my mother; "now," he said, "that you should have ever felt that way is incomprehensible, and to anybody that hears that statement and did not know to the contrary it could suggest but one idea on earth to their minds and that was the idea in your mind of incest; that I know you did not think of, but that is the inevitable conclusion;" I am now giving the language of my father; I didn't have much to say during the conversation; the principal talking was done by my father in an earnest, affectionate way; at some point during this interview, I don't remember just exactly where, Mrs. Atherton and her sister said, "We don't want to hear any more of this." Mrs. Atherton's attitude during the entire conversation had been one of resentment against anything that had been said; it did not seem to have any effect upon her; it was of unwillingness to listen or to pay any attention to it whatever, and they got up and started to leave the room; they were near the fireplace sitting down, one or both of them, or sitting part of the time, and I was sitting on the bed as I recollect it; when they got up and started for the door I was between them and the door, and I instantly got up and went to the door and put my back against it; when they started toward me I said, "Mary, father is trying as hard as he can to see if he can do something toward getting some of these difficulties out of the way, some of those difficulties between us, and I don't want you to go out; I want you to stay here and listen to him;" I said, "You must stay and listen and hear," and I put my back against the door;
151 she advanced to within two or three feet of me; I did not touch her; I did not say, "Damn you;" there was not an oath used by either father or myself during that entire interview; there was no anger expressed on our part, either one of us, during that interview; when I stood in the door she came up very close to me, her sister behind her, within two or three feet, and I did not move, and she stood a moment and turned around, and as she did so she said (witness strikes his hands together three times), "Two Southern bullies bullying two defenseless women;" my father said, "Mary, aren't you ashamed of yourself? don't you know that you and Ethel are not in the slightest danger in any way; that I am simply trying to make some impression on you, to show how something which you have said to Peter Lee—what the impression on his mind is bound to be, and it don't look as if I am doing very much good;" the conversation lasted some little while longer, and seeing that it was making no impression—at least we thought it was not—we both left the house; neither I nor my father in that interview, or any part of it, spoke of Mrs. Atherton as a dirty creature, and nothing was said by either of us about turning her a disgraced woman into the streets, nor was anything said about taking the baby away from her in the sense that we were just going to take the child away; it was said that if it was generally known that my wife had been jealous of my mother that people generally would form a very bad idea, or something to that effect, of her—would think very strangely; there was nothing said about going into the

streets; with regard to the child being taken away, father said, "If this thing goes on I don't see how you and Peter Lee can live together; I don't see how any two people who feel that way, or one feeling toward the other as your conduct will inevitably
152 make him feel toward you, can live together;" she said, "Oh, she could never leave the baby or give up the baby," or something of that kind, and father said, "If you should go away, or try to go away, Peter Lee not being in fault, you would not be allowed to take the child, and if people who have a child ever have to separate, the one on whom the responsibility of the separation rests will not be allowed to take the child, and Peter Lee would not allow you to take the child with you;" my father did not say anything at that time in regard to his ability to buy judges, or that it would be useless for Mrs. Atherton to do anything anyway, because he, John M. Atherton, could manage it any way he liked; after this conversation my father and I went to our office; very shortly after I reached the office I was called to the telephone, and I recognized Miss Ethel Kelsey's voice; she said that Mary wanted me to come up to the house; I did not go; my father went at my request; I went home about half past twelve; we had dinner at one o'clock or lunch; my father went home about half past eleven, I think; when I got home my father met me downstairs at the door; we then went upstairs to the room then occupied by Miss Ethel Kelsey; my father said to me in the presence of Mrs. Atherton: "I have now had a talk with Mary, and a very satisfactory one, and I believe that some of the things which have caused a great deal of trouble between you and her in the past are now gotten out of the way and will not be repeated in the future, and I believe this morning I have done some good; Mary says she understands now how such things make you feel and how they must make any one feel, and they will not be repeated, and now I hope this is all right;" she came to me, I put my arms around her and kissed her, and as I did so my father went
153 out of the room; we went down to dinner; my mother was not there; at the dinner table was my father, myself and Mrs. Atherton and Miss Kelsey, and the dinner passed off very pleasantly; immediately after dinner we went downtown; we went down to the office and returned just before supper, about half past six, or between half past six and seven, our customary time; Miss Kelsey came down to tea; Mrs. Atherton did not; I did not go upstairs before tea; Miss Kelsey said that Mrs. Atherton was not coming down; that she was sick and did not want any supper; my father and I after supper went to his room on the second floor; we had just gone in there from supper, it was on the second floor, and Mrs. Atherton's room was on the third floor; the door of the room where we went in was open, and in a minute or two we heard screams; they were repeated in a short time; in a few moments Miss Ethel Kelsey came downstairs and said, "Peter Lee, won't you go upstairs and see Mary?" I did not go; my father went at my request; I said I could not do any good in this affair; he stayed up there ten or fifteen minutes and then came down again; I saw Miss Ethel Kelsey afterwards; she came downstairs some little time—I would not pretend

to say the exact number of minutes, after my father came back from upstairs, and said, "Peter Lee, Mary says if you will come upstairs she will be quiet;" I went upstairs; Mrs. Atherton was lying on the bed crying violently; she was at times hysterical, and almost in a frenzy; I said when I went in, "Mary, this sort of thing won't do," or "this must stop;" I sat down on the bed and she threw herself over into my arms, crying very violently, and I tried to quiet her the best I could; she did not scream any more after I went in, but the crying continued and in a few minutes she said something,
154 "Oh, just think what was said to Ethel this morning," and began to pull away from me again and seemingly getting very angry, moving over to the other side of the bed; I said, "Mary, now if this is going to begin again, your anger, I will go back downstairs;" I said, "This can't do any good; I can't do any good under the circumstances;" she says, "Oh, don't go, don't go;" she came right over to me again; "Now," I says, "just stop and keep quiet and I will stay here;" that thing was repeated two or three times; finally she became a little more quiet; I undressed and got into bed with her; after she became quiet she was suffering very much from exhaustion; she had been hysterical; I did not remain all night; along towards morning, after she had gotten quiet and gotten asleep—I had practically no sleep—I went downs-airs; there was no other unoccupied room on that floor and I went down to a room that was not occupied and went to sleep; I saw her again the next morning; the nurse or some one at least of the girls in the house came and said that Mrs. Atherton wanted to see me; as quickly as I could, just getting on something, I went upstairs; Mrs. Atherton was sitting in front of the fire in her room in her night-gown or wrapper with the child lying on her knee; she said, "Laddie, I want to ask you, as my husband and as the father of this little child, to forget what occurred last night; I don't know why in the world I did as I did; won't you forget it and say nothing more about it and let it go?" I said, "Yes, I will;" simply saying this, that these things must not occur any more, and I says, "You cannot stand it, you are completely worn out and exhausted this morning, and it is very bad for the baby at this time," and I said, "I cannot stand it;" I said to her, "You know that yesterday at dinner time all that
155 had occurred in the morning was all over and you were bright and happy, and said that it was all right, and why on earth you went into this thing again I don't know, but now," says I, "let it go so that it does not occur any more;" I had a further talk that day, it was either that day or very soon after, with Mrs. Atherton in reference to Miss Ethel Kelsey remaining; she told me that she had spoken to my father in the interview which she had with him when he came back from the office about Ethel staying and said yes, that he wanted her to stay and would be glad for her to stay, and she said, "Ethel is going to stay if it is all right with you;" I said, "Certainly; I shall be delighted to have her stay," and said, "I hope we can all give her a pleasant time," and I said, "I will do all I can in that direction."

Q. Did she in that conversation say anything about her having telegraphed for her father?

A. Either in that interview or in some other interview—I think it was when my father left us two alone and went downstairs—that she had telegraphed for her father to come, and they afterwards telegraphed him not to come.

Mr. Kelsey came on Sunday and went to the Galt house; I had only one interview with him in the presence of Mrs. Atherton; that was at our house at dinner that day, where we were all present; we had a talk with him about private matters; for the first few minutes of the interview with him my father was present and then Mrs. Atherton came into the room; when Mrs. Atherton came into the room I told her that my father had said to me when I came into the room that Prof. Kelsey had said to him that I had treated my wife like a brute when she was in the family way; my father said,
when we were both in the room, that he said to Prof. Kelsey
156 that he was a liar when he made that statement; the first thing that Mrs. Atherton said after she came into the room was, "Father, did you say that?" she approached pretty close to Prof. Kelsey and said that in a moderately low tone of voice, but perfectly audible; she says, "Did you say that?" he said, "Yes, I did;" she says, "You ought not to have said it;" my father said, "I have requested Prof. Kelsey to state why he said so, and I think he ought to do it;" I said to him, "Yes, I want you to do it, and I want to say to you, Prof. Kelsey, if any living man had made that charge except my own father or the father of my wife it would have to be personally settled, man to man, between us as quick as I could get to him, or the instant I knew it; but," I said, "as you are the father of my wife, there will be no personal settlement of this matter between us;" when I was making that statement he began, "Hush, hush, stop that; don't let's have anything of that kind at all;" waving his hands (witness illustrates) and speaking in a very contemptuous way; I was outraged and angry and thoroughly indignant and aroused, and while he was doing this, and finding that he would not listen to anything I said, I went right up to him and I took hold of both of his wrists, and I said, "You have at least got to pay enough respect to me to hear what I say;" I did not make any effort to strike him; my father said soon after my wife came into the room, "Peter Lee, I think I would want to know at least where my wife stood about a matter of this kind," and I said, "Yes, I do;" I turned around to Mary, and she walked right up to me—we were only a few feet apart—and put her arm in mine, and stood there by me; I said, "Prof. Kelsey, I want to know why you have made this charge; I think I have a right to know;" my
father had said in our presence that Prof. Kelsey had re-
157 fused to give him any reason; my wife said that he must have referred to what occurred at Clinton the first night after I came back there before the child was born, and I said to Mary, "Will you state what occurred that night?" and she did state; she stated that when I came I was dissatisfied with the fact, or did not like the fact, that she was in a small room, had been there, and

there were so many people in the house, especially those two young men; that I had said that I did not think that her family were treating her with the proper kind of delicacy, and had made some criticisms of that kind on her, and I had said when I learned that we were to go downstairs the next day, and that she was to be in a room in the front of the house and I in the rear—that if that was the case that I thought I had just as well go down to New York and stay there until the child was born; that I could not be of very much comfort to her; that was the statement that she made, and when I said that, that she did not like what I had said about her family, and that in connection with that and the fact that I said I was going away; that she had cried very violently, which could easily be heard that night, and that that must be what her father referred to, and he did not say whether it was or not; he never cited any instances, but remained silent; the interview ended very shortly after that by my wife saying, "I think there has been enough said about this," or something of that kind, and my father and myself went out of the room, and in a few minutes Prof. Kelsey went out of the room and out of the house; I saw him the next day; he came to our office, and had a few minutes' conversation with my father in the private office.

Q. I would like to ask you as to whether you had any con-
158 versation with Mrs. Atherton when you learned that Mr. Kelsey was in your house like this, or substantially like this: "When my husband learned that my father was in the house he came to me and said, 'It rests with you what reception is given to your father; if you wish it to be peace tell him everything is peaceable, everything has passed off;' I said to him, "That is the way I want it to be; that is the way I have always wanted it to be?"

A. I did have a conversation with her, but it was not that, or anything of that nature; it was a brief conversation.

She said to me, "My father is here; I don't know why he came after we sent him that second telegram, but he is here, and now if he will I would like to have him come out here," something to that effect, that she wanted it to be pleasant; I said, "Certainly, I wish he would come here to stay;" I asked the Professor and my father asked him in my presence and in the presence of my wife if he would not bring his things from the Galt house and stay; we asked him to stay to dinner in the middle of the day, and he stayed and remained there the rest of the afternoon; I do not remember that in the interview with Mr. Kelsey in the library that either I or Mr. Kelsey addressed the question to Mrs. Atherton, "Was your husband unkind to you?" she did not say to him in that conversation that I had been unkind to her; I did not in the month of April, or at any time, say to my wife that she was a dirty, nasty creature, or a nasty negro, or a dirty slouch, or not fit to be looked at, or not respectable, or that I would not touch her for anything, or that she was dirtier than a nigger, or that she was a nasty, dirty cat, dropping offal around the room, or a disreputable, dirty creature; after this inter-
view with Prof. Kelsey I went South with Miss Ethel Kelsey;
159 this was before I went to Cincinnati; my father only re-

mained at home with Mrs. Atherton while I was gone with Miss Ethel Kelsey; no one went South with us; we went alone; we were gone about ten days, as nearly as I can recollect; I said no one was with us; I don't remember whether there was any one on the train that I might have happened to know; we did not go in any party, nor were our movements dependent on the movement of any party; our party consisted of Miss Ethel Kelsey and myself; there may possibly have been some one on the train that I knew, but they did not go to Pass Christian with us, nor did they leave Louisville with us as any part of our party; it was after we got back from the South that I went to Cincinnati; the letter that was read here in evidence the other day, dated the 24th of April, 1890, was the one received by me when I was in Cincinnati; when I got back home from Cincinnati and in the month of May Miss Kelsey went home; Mrs. Atherton and I accompanied her to the station when she was to leave the city; while we were waiting to go on the train Miss Kelsey said to me, among other things, "Oh, Peter Lee, do be kind to Mary;" I said, "Ethel, it is not necessary even to make that sort of request to me; I have always been kind to her and I always expect to be;" Ethel was crying just a few tears in her eyes; she brushed them away and as she did so I understood her to say, "You need not think I am crying to leave you, because I am very glad to get away from you;" I said nothing; I walked away; when the time came Mrs. Atherton did not go into the train; I accompanied Ethel into the train, carrying her satchel for her and put it down; I shook hands with her, and she offered to kiss me; I said, "I don't think there is any use, after what you said to me a moment ago on the platform, to have any hypocrisy or foolishness now about our leave-taking; good-bye;" I raised my hat, started out of the car and went off of the platform; she came out to the door of the car and out on the platform and commenced crying a little; Mrs. Atherton was out on the station platform; Miss Ethel Kelsey came to the platform of the car, and she stooped down and she told Mrs. Atherton what happened in the car; Mary said, "Oh, Laddie, you ought not to have done that," or something like that, and I repeated to her what Ethel said, and something was said, either by Mrs. Atherton or by Ethel, that there must have been some misunderstanding; then I said, "Well, if that it so, all right; if I did misunderstand for any reason, I am glad of it;" I kissed her, and she went on the train and went away; I did not push Mrs. Atherton toward the train at that time, nor did I say, "You may as well go, too; nobody wants you here," nor did I say to Mrs. Atherton, "If that is the only tie"—meaning the child—"you may as well go; nobody wants you here, and I will divorce you, sooner or later;" nothing of that kind was said by me; none of that conversation occurred; in regard to the statement that I said to my wife that she ought not to look glum, that she was very disagreeable, I did not use that language, nor did I make any such statement in the sense that it is alleged; I remember one instance in the spring of 1890, when the little child had been sick; there was not anything seriously the matter with it, but Mrs.

Atherton's face displayed a great deal of—I don't know exactly what to call it, except that it was a hard face; she seemed to immediately get under tension when the child was sick; her face was set; it displayed anxiety; it seemed to display a little more than anxiety; I said to her, "Mary, you ought not to let sickness have the effect upon you that it seems to have from
161 looking at your face; no one wonders that you are uneasy or solicitous or anxious about the little child, as indeed any mother would be about her first baby," for I was a little anxious myself; says I, "No matter how anxious you may be, she may be ill more; if it has that effect upon you you cannot do for her as well as you ought to; it is bad for you;" this was not said in an angry way; it was simply expostulating, or in a kindly tone requesting her; I never said to Mrs. Atherton at any time that she had run after me; I did say to her that I had never asked her to marry me, under these circumstances; as to the time, I recollect that it was not a great while after we were married; we were both in perfectly good humor; she said to me once in a serio-comic way, "Mr Atherton, do you know that you never asked me to marry you?" I said, "I do;" now, these may not be the exact words, but words to that effect; she said, "I think I have been cheated out of something that is due every woman that is married, and that is a proposal, and I want you to make one now;" I said, "I won't do it; I got you without going through that, and I am not going to do it now;" it was said just in that way; there was no definite proposal at the time I met her in St. Augustine; that thing was referred to not only once but a good many times, and a good deal of fun was had out of it, trying to get me to make that proposal; I did use the expression to my wife that Mr. Cox used about walloping the jackass; it was not in an angry way, but in a jocose and bantering fashion, of which we did a good deal with each other, pleasantly; I had some talk with Mrs. Atherton in the spring of 1890 about taking her to Clinton in the summer of 1890 to her sister's wedding, in a general way, and specifically about taking her to the wedding later on in the summer, at Cresson Springs, Pa.; I went from
162 Louisville east to Saratoga some time in June, 1890; I went from Saratoga to Cresson, and was joined at Cresson by Mrs. Atherton and the baby, who were brought there by my father; I remained after my wife came, I should say, about two weeks, perhaps more; it was not a great while; I left Cresson to take my mother home; her father died while we were there; just at the time that the news of his death was received she was not able to travel; my father went immediately home to be there at the funeral, and as soon afterwards as my mother was able to travel she went home—about four or five days or a week after her father died; I took her home and left Mrs. Atherton and the baby at Cresson Springs, telling Mrs. Atherton that I would return in a very few days; while we were at Cresson I had several conversations with Mrs. Atherton in regard to her going to Clinton that summer and in regard to my going; I learned shortly after I left Louisville that her sister was to be married on the 31st day of July; she wanted to go on to the

wedding and take the baby; to her going I made no objection; I had told her before she left Louisville that while matters stood between her father and myself as they did at that time, with no explanation made, or apology offered or retraction in any way for what he said to me in Louisville, that neither would I put my foot in Clinton nor should my child with my consent be taken there; I did not want my child to go there, and I did not want her to go there, because if she got there and either the child or she got sick I had got to go there under what was to me very unpleasant circumstances; that was the same position also which I took at Cresson; after I went away from Cresson to bring my mother home, I got a telegram from Mrs. Atherton saying that she had gone to Clinton; that her mother was ill; I do not think that I
163 was angry while I was at Cresson; I talked to Mrs. Atherton in a very earnest voice a number of times; it was the same subject going over and over again; I did not in any of these conversations say to Mrs. Atherton that she was a false, unloving wife, and that I would divorce her; I said I thought it was rather strange that she did not sympathize with me more in the position that I had taken toward her family than she did; that most wives under the circumstances, I thought, would not have wanted to take the child back to Clinton; that it was perfectly right for her to go to her sister's wedding, but I did not want the baby to go; I did not say to her that I would divorce her because she was an indecent woman; I never said that she was an indecent woman; I never said to her she was a dirty nigger, or a nigger at all; I never applied any epithet to Mrs. Atherton during her married life, directly to her; I have used some terms, such as that it was an unnatural view of things, or a curious way to look at things, but the word lazy, or any of the offensive epithets which have been specified, I never applied to her, nor did I ever swear to her; I never used the word "damn" to her, nor but once in her hearing that I remember, and that is not in the record; it was in the spring of 1891, in Tallahassee, when I was talking to Mrs. Atherton about renting a place for the summer and seeing how we would like this country life before we bought a place, and to my surprise she said that she didn't think she would like it; that she had changed her mind, and she thought she would like to stay in Clinton, and if I wanted to try the experiment of residing in the country I could go there and stay by myself; I said, "I will be damned if I do;" I remember that.

After Mrs. Atherton went to Clinton, in July, 1890, I met
164 her next in New York about the first of September; she and Miss Goodenow came down with the baby to New York and I met them there; Miss Goodenow left New York before we did, and Mrs. Atherton and I came home; I discharged the nurse in New York; I discharged her for two reasons: she was very often impertinent to me and disagreeable in her manner and bearing, and I did not think she was exactly the right kind of nurse for the child, and I discharged her in New York because she lived in the East, and I did not think it was necessary to take her all the way to Kentucky, paying her expenses back to the East; I gave her a

month's wages and paid her expenses to Boston from New York; I did not at that time tell Mrs. Atherton that she was a bad mother, or did I begin any attack on her; I said to her that I thought she and I together could take the little girl to Louisville.

Passing now from September, 1890, to November and December, 1890, and January, 1891, I did not, in the months of November and December, 1890, and January, 1891, have any conversation with Mrs. Atherton at all in which I said to her that she was not my wife, but my mistress, or in which I said that she was a common woman; I did not on either of those occasions say that she was an indecent woman, or that she was as dirty as a nigger or worse than a nigger; I returned from New York to Louisville in September, and remained in Louisville until we went South on the 14th of February, 1891; we remained in the South until the 28th or 29th of March, 1891; we left Tallahassee about that time and came directly through Louisville to Clinton, upon the occasion of the serious illness and, as it turned out, the death of Prof. Kelsey; when Mrs. Atherton heard of the serious illness of her father in Tallahassee, she may have said, "I suppose you will go with me;" there
165 was very little said by her because I said to her at once, "I will go with you;" later on something came up about going and I said, "Whatever personal differences there may have been between your father and myself in the past will be passed over at such a time as this and I will go with you;" there was never any debate on the subject; we went as fast as we could from Tallahassee to Clinton, stopping only at Louisville between trains; that was the quickest way to go; we got to Louisville in the morning, and stayed until about noon or two o'clock; we went on to Clinton, and when we got there we found that Prof. Kelsey was dead; we remained to the funeral, and I remained a few days after; I was taken sick the night after the funeral with the grip; I remained there, I think, about a week, and left as soon as I was able, and went back to Louisville; Mrs. Atherton returned to Louisville about the middle of May—it may have been the 10th—I don't remember exactly; I met her in Cincinnati and came down with her to Louisville; we remained in Cincinnati a day or two.

After her return from Clinton and along towards the latter part of May, 1891, there was an unpleasant interview between Mrs. Atherton and myself.

The attack of grip which I had had at Clinton left me in bad shape; I was suffering particularly with my old trouble, dyspepsia and indigestion, and it was very difficult to get anything that I really could eat and digest; I had requested Mrs. Atherton about preparing some little things for me, and I called her attention to the fact that she had forgotten something which I had asked for, but I said, "You manifest very little interest in this whole matter, and while I do not want to claim any special consideration on your part for my going to Clinton with you—because I think it
166 was perfectly natural that I should have done so under the circumstances—that trip brought this thing back on me, for I was a great deal better at Tallahassee, and now, that being the case,

I think you might at least show some little interest more than you do seem to manifest about whether I can eat or not;" this conversation occurred in our rooms on the third floor at Louisville; I said to her, "I can ask the housekeeper to fix these things for me, or to see that these things are prepared, but I do not like to do that, with my wife in the house;" "Well," she says, "I can speak to the housekeeper about it;" I was a good deal irritated at that, and I said to her, "I had expected a different answer from you when I made that statement, and that was that you would at least see about these things yourself," and I expressed a good deal of indignation at that treatment, and Mrs. Atherton, while I was talking, went out of the room and went downstairs to my mother's room, and I went down there and said to her in my mother's room what I was saying when she went out of my room, that I thought it was a very unusual proceeding on the part of a wife not to seem to take any interest at all in her husband's condition at that time, or whether he got anything that he could eat; that night, as I recollect it—it was soon after that, whether it was that night or that afternoon, I think it was that night—that matter was referred to again in our room, and I said to her, "I think it is exceedingly strange, it is almost incomprehensible to me, that any reference by me to you about my health, or brought to you by any one else, should always throw you into a temper;" she says, "It always makes me feel that you ought never to have been married;" I said to her, "That is a revival of the old charge that I ought never to have married, and to my mind carries with it that same idea of deception and so forth;" there was little
167 said after that; I left the room in a few minutes and went into the room across the hall and stayed there a day or two; I was then quite unwell, and was so unwell in two or three days after that I had to go to bed, and I went downstairs to the room which my father usually occupied and stayed in that room in bed for several days; in a few days I was up and better and I went to Chicago, intending to remain in Chicago until Mrs. Atherton was ready to go on to Clinton; I had another conversation with her; that conversation took place two or three days after this first conversation with Mrs. Atherton; at the time I was taken sick and went down into this room I said to her, "It is impossible for me to stay, or I feel that it is impossible for me to stay, in my present condition, where you are, or when you treat the matter of my sickness in the way that you do, and have said to me what you have about it; I am going away; you have had the child for some length of time, and now I am going to take the child with me; or you can go to Clinton, as you have expected to go there for the summer; you can either go to Clinton and leave the child with me; I feel that I cannot stay where you are; I feel that I must make some effort to get better and be surrounded by different influences than I am here, and I don't think I ought now to be separated from the child; she has been away from me quite a good deal of the time since she was born, and I think I am as much entitled to her company while I am trying to get well;" I said, "I will give you one or two days," I forget which, "to make up your mind whether you will leave

quietly and go to Clinton, or whether I shall make arrangements to get some competent person to take the child to Chicago with me;" at the time Mrs. Atherton's father died, she said to me,
168 "Now, my mother will be here alone this summer, my father is not here, and I want to come here and spend the summer; won't you come and stay with me as much as you can?" I said, "Yes, I will," and I assented to her going there to spend the summer with the child.

A day or two after I said to her that I would give her one or two days to make up her mind, I sent for her to come to my room and told her that, while I felt just as I did before, I was going away as quick as I got able, and that when it got hot in Kentucky that she should take the child and go to Clinton and spend the summer, with the understanding that when the cool weather came on, certainly by the first of October, that she should bring the child back then; she said, "I will do that;" I said, "Now, you will bring the child back at that time?" She says, "Yes, and I have never lied to you;" I think probably the same day, or the day after, on which I said that I would give her two days to decide the matter, I asked my father and her to come into the room which my mother occupied when she was at home, on the second floor; I told my father I wanted him to know exactly what I had said; that Mary had said I ought not to have married, and what I had said; that I had said to her that I would give her at least a day or two to decide whether she would go to Clinton and leave the child with me, or that I would go away and take the child; some conversation occurred, and some of our troubles were discussed briefly, and among other things my father said to her, "Mary, I am afraid there is a fundamental difference in your views of life and the responsibilities of life and those of Peter Lee; Peter Lee loves to work; he thinks he ought to work, and thinks that he ought to do his duty in the community in which he lives as a man; you seem to think that there is no responsibility devolving upon you, that you have nothing to do but
169 take an entirely different view of the serious, sober part of life from what he does; I am afraid there is that radical difference between you;" she said, "Father John, you are right; there is that difference between us; Peter Lee does love to work, and does work when he is able to work, and thinks it is his duty to work, and I did not marry him with the idea that he would; when I married him I thought that I could go to balls and parties when it was proper, and theatrical and other kinds of entertainment, or be traveling, and when I was not doing that that I would have a pleasant time at home with my husband; he said to me, "Well, if that was my wife, and I could get a divorce, I would do it;" my father said that to me; I said nothing then about a divorce; I did not in that interview, or in any of the interviews in May or June, say that I was going to divorce Mrs. Atherton, or that I did not want anything more of her, or that she must get out of the house, and that I was going to keep the child; I said I did not want to be with her any more under those circumstances.

By the COURT: When you gave her the two days to decide

whether she would go to Clinton with the child, or whether you would take the child and go to Chicago, whether she would go peaceably, was it the intention that you then should keep the child independent of her?

A. Are you asking my intent?

Q. Yes.

A. No, sir, not permanently; my intention was to have the child with me for a time; I was going to make an effort to try to get well, and I had no definite intention beyond that; the way it was permanently settled I expected to take the child with me to Chicago for a short while and send it to her at Clinton.

170 Q. How old was the child at that time?

A. The child was 18 months old.

Q. You expected the mother to decide whether she would go off and leave the child without a struggle at that time?

A. I can't say that I expected she would; I felt under the circumstances that I might take the child with me for a while to Chicago, and that was what I really expected to do, for I did not expect that she would leave, but I said that to her under the influence and smarting under what she had said to me, and in thinking the matter over I told her that I had decided—that was before she gave any answer; she did not give any answer, and I abandoned the idea.

To Mr. HUMPHREY:

My father did not say, "We will take the baby away from you whenever we choose;" what he told her was that she could not go away and take the child and keep it; she said she believed she could; that if any separation came or had to come or did come she could take the child; father said, "I don't think you can;" she said she thought she could; he said, "If you have any doubts on that subject you had better consult a lawyer;" there was nothing said at this or at any other of these interviews to the effect that Mrs. Atherton was a dirty creature or an indecent woman; nor was it stated that it was her desert that she should be tortured by me; nor was there anything said about my getting a divorce from her at all, by me; I never said anything like that during our married life; I did not say that I would make arrangements to divorce her that summer, or that I wanted to keep it hanging over her head during the summer; it was during that time that the subject of where the custody of the child would go was frequently

171 mentioned, if there was any separation; there was never any divorce mentioned; the word separation was frequently used by both of us, but I never said to my wife during her entire married life anything about divorce.

It now lacked but a few minutes of 6 o'clock, and Mr. Humphrey asked for a recess until morning. Judge McLennan said the case must be finished today. Continuing, the judge said:

"I want to ask one question. I have been thinking about it a good deal. I want to ask whether it is impossible at this stage for

these two young people to get together. There are several considerations which urge me ask it. There is not only the welfare of these two parties, but there is a child in this case, and a child that does not know its father is in a very unfortunate position, if this is to continue as long as the little one lives. I am satisfied that neither of these parties are bad people. They intend to be good people, Christian people, and considering the infant, dear to both, they ought to contrive to get together and be man and wife, and especially father and mother. The desires of their fathers and mothers, brothers, sisters, and aunts are not to be considered. They will soon pass away. The child will have to stand it as long as it lives. It seems to the court that whatever humiliation it may bring for the time being or whatever sinking of self may be required, it is their duty to join hands over the cradle of the little baby. The father or mother, or brother or sister, or the lawyer who attempts to interfere in this is no friend to any of the three parties interested in this case. If I had seen anything of bad heart or wickedness in these parties I would be the last one to make this suggestion. Except for foolishness somewhat, ignorance a little, interference a good deal, and
172 unfortunate circumstances they might yet be living happily in home by themselves and make the little child happy. Both their lives will be blasted if they don't come together. This court has no desire to shirk any responsibility when the evidence is all in. But it will be cold comfort to either of these parties as the days and years roll by. In this class of cases I think it proper that the court at least should call attention to the seriousness of the step asked to be taken. Remember, when the judgment of the court is rendered, this little girl is either without a father or without a mother for all practical purposes, and that will be its condition through life. I ask these two parties to consider these facts, and I hope they may be able to come together before this court meets again."

The defendant said: "If you had sat here and had heard the testimony given against you which I have heard given against me by the woman who was my wife, and you believed that that testimony was unjust and false from beginning to end, would you, under such circumstances as those, consent to a reconciliation?"

Judge McLennan: If I had a cradle to look into I would forget it all before I would disgrace the contents of that cradle. I would sacrifice every other consideration except to make that child a happy home and an honored name.

The defendant said something more about his name not being dishonored now, and wished to continue, but Judge McLennan had nothing to add to his remarks, and, ordering court adjourned until 9.30 a. m. today, left the bench.

173 To Mr. Humphrey:

I never at any time said to Mrs. Atherton that she spent my money on her nasty family; I said to her that I did not want any money of mine in any way to go back to Clinton in any shape, feel.

ing as they did towards me then, and "as long as they feel towards me as they do;" I never said to Mrs. Atherton that she was extravagant or too extravagant; I said to her on many occasions that I was willing for her to use my credit; I frequently asked her to get things, encouraged her to buy clothes and things for herself of any kind; the sealskin cloak that is charged in the fall of 1890, in the bill, was bought by me; she and I were together; I purchased it with her and gave it to her.

Going back to the interview in May, 1889, my father came upstairs that night after Mrs. Atherton and I had had an interview, just about the close of the interview; he came into the room, just inside the door; he did not say, "Peter Lee, what the devil are you doing?" his first remark was something entirely irrelevant to the situation I think about some business matter; then he said, "I don't see how you can expect to get much better, or to improve, in your condition, when you sit up as late as you do;" that was all he said; he then closed the door and went out; I did not at that time say, in the course of that interview, or at any time, to Mrs. Atherton, "I hope what is within you will perish," nor did I ever say anything of that nature, in any shape, form or fashion.

Returning now to the fall of 1891, Mrs. Atherton had been in Louisville just a week before she left the house on the third of October; that was on Saturday; she had returned the previous Saturday; my father escorted her from Cincinnati; I met her at the station in Louisville, and kissed her when she got off the
174 train; I had a conversation with Mrs. Atherton on the morning of the 3rd of October; I said to her, "I want to have a little talk with you about money matters; as you know, some time ago the allowance which I had been giving you was stopped and you have since that time been buying anything that you wanted at the stores, making your bills wherever you liked; I wish now to go back to the allowance plan, and I am going to give you $60 a month for your personal expenditures;" she says to me, "Shall that cover the baby's expenditures, too, for clothes?" "No," I said, "get whatever you want for the baby and have it charged to me;" she said "Well, $60 a month is not enough; I cannot dress as you would like to have me, becomingly to my position as your wife, on $60 a month;" I said to her, "You can dress comfortably, I think, on $60 a month, and as to dressing in a becoming way to your station as my wife, you may not consider that matter at this time; beyond the fact that you dress comfortably, it is a matter of entire indifference to me how you dress; you can wear calico, as far as I am concerned, if you choose to;" she repeated, "I cannot dress on that as I ought to, and I shall do as I have been doing and make bills whenever I want things in the stores;" I said, "If you do run up bills in the stores against my wishes and when I have expressly requested you not to, I shall notify these stores that I will not pay your bills in the future;" I might have used the words "publish" to convey that meaning; I think I did use the word "publish;" a little while after that I was going down the steps from the third story, and Mrs. Atherton called me from the door of her room and

said she wanted to speak with me a few minutes; I went in there, and together we went into the little dressing-room which
175 opens out of her room; she first, as I remember it, said to me that she was not satisfied with the way that she was then being treated in the house and that she wanted me to know it; I said, "In what way are you not being treated right?" she said she was not treated with any attention or treated with proper consideration; I said, "You have been treated with all consideration and perfect civility, and at this time my feelings prompt me to do nothing more;" she said if she had known how things were going to be she would have stayed at Clinton with the baby, and now, she said, she felt very much inclined to go back to Clinton with the baby; I said, "You can go back to Clinton whenever you wish, but you cannot take the child;" she said further that she wanted me to know and wanted my father to know that she was perfectly willing and ready at any time to take this matter into court and have it settled as to who had been right or wrong and to whom the custody of the child should be given; I said, "Whenever you get ready to take the matter into court and want to do it, it is your privilege; do it at any time that you feel so inclined;" there was considerable conversation, in the course of which she said to me that I ought not to come in her room and speak as I had about the baby's food or something to that effect; I said, "I spoke to the nurse about the child's food, and I shall continue to say anything which I think ought to be said that pertains to the baby's welfare in any way;" the room in front of the room up here was being fixed for a separate nursery, and I said, "The room will be fixed in a few days and the child will be in there, but whenever the child is in there I will come in, and wherever the child is, and I want to say here that I shall come in there even though it seems to excite your displeasure, as what I had said
176 to the nurse last night or this morning seems to have done;" I said, "I have not made any criticism of you at all since you returned; I have not come into your room unless it was to say something about the child, or when the child was in there;" she said, "No, it would be no use for you to come into my room for any other reason; you can go where you have been in the habit of going;" I said, "Mary, what do you mean by that? do you mean that I have been in the habit of going to improper places, or with improper women?" she says, "You know perfectly well what I mean, and I can prove it;" I said, "You have got to prove it now; this is the second time that you have charged me with infidelity since we have been married, and I told you the first time you did it that the thing must never occur again;" this occurred in the dressing-room, and I walked into the room where the child was on the floor playing about, and picked the child up in my arms and carried it out into the hall and across the hall into the room which I was then occupying; I moved pretty quickly, and Mrs. Atherton followed, but I got into my room before she reached the door; I closed the door and put my foot against it, with my toe turned up on the bottom; I did not lock the door, but put my foot against the door and held it; Mrs. Atherton came to the outside of the door and

tried to get in; then the child began to cry; up to that time the child had not cried at all; Mrs. Atherton still persisted in trying to get in, and, the baby crying, I stepped back from the door and opened the door; Mrs. Atherton came at once into the room and acted as though she was going to take the child away from me; I had the child in my left arm; I held my right arm in this position (illustrating), and I said, "Keep away, keep off—you cannot have this child now;" I did say to Mrs. Atherton when I picked
177 the child up from the floor that I intended to take this child away with me; I said, "A woman that has made such a foul charge as you have made against your husband, without the slightest reason or provocation, is not fit to have the custody of a sweet little girl baby, and I intend to take her away with me;" she did not go any farther in trying to take the child away; I had my hand in this position (illustrating), so she could not get to me, and the child then began to cry still more; it seemed to be frightened, and in the meantime the nurse had come into the room; my best recollection is that the nurse was in the room where I picked the child up from the floor at this time, but I am not positive; but at any rate at this stage of the proceeding the nurse was in the room, and when I was holding up my arm the child was crying then pretty violently, and I said, "I cannot go on with this thing any longer with the child crying," and I turned around and handed the child to the nurse and walked out of the room, and the nurse immediately turned the child over to Mrs. Atherton, and I stayed in the hall a few minutes and went back; in passing by I looked in the door and I saw that Mrs. Atherton had the child in her arms; I said, "All right, put the child to sleep in my room, but don't take her back into your room;" I then went back downstairs in a few minutes; the child went to sleep very soon, I don't remember how long, but it was not a very long time; I heard Mrs. Atherton crying very violently in my mother's room, and my mother talking to her; I walked into the room; the minute I came into the room my mother said, "Peter Lee, don't take the baby away; you must not take the baby away from Mary;" I said, "Mother, I think you had better wait a moment before coming to any conclusion or passing any opinion upon
178 the matter, and hear what Mary said to me to make me say that I intended to take the child away;" I then repeated to her what occurred upstairs; I told her that Mary had said to me that I had been in the habit of going to improper places; I then repeated the conversation; I said, "Mary said to me that I could go where I had been in the habit of going;" says I "What do you mean by that, Mary? do you intend to say that I have been in the habit of going to improper places or with improper women?" Mary said to me, "You know perfectly well what I mean;" I said, "I know what she did mean, and she had charged me with infidelity;" mother turned to Mary and said to her, "Did you make that charge against Peter Lee?" she said, "Yes, I did;" she said, "Do you believe it?" Mrs. Atherton said, "No, I do not;" soon after that, I think in a minute or two, mother again began saying something about not taking the child away, and I repeated that I did not think

that any woman who had used the language that she had and accused her husband of that crime, even if she did not believe it, ought to have that little girl with her; then Mrs. Atherton came towards me, crying, and started to put her hands upon my shoulders, and I took hold of her hands, with no more force than was necessary—no force, in fact; no more than was necessary simply to lift them back off of my shoulder and pushed her away from me, not roughly at all; I did say, "I don't want you to touch me; I would as soon touch a snake;" I was very angry; every feeling that I had was outraged at the time; I had never given her any cause for even a a suspicion of such a charge as that, and I was deeply wounded, and my feelings were outraged; I then went out of the room.

Q. Did you in that conversation that morning, or did you ever in any conversation, ever accuse Mrs. Atherton of any such offense?

179 Mr. MILLS: I object to it.

The COURT: He may answer the question,

A. I did not; I never had the faintest shadow——

Objected to.

The WITNESS: I would like to answer this question for my wife's benefit.

The COURT: You may state.

The WITNESS: I never had any reason, or the slightest shadow of reason, to believe her to be untrue to me, and I knew that she was not.

My mother did not say in that interview, "I, too, have been accused of infidelity," nor did she say anything like that, or that could bear any such construction that I heard.

I have detailed the conversations between myself and Mrs. Atherton on that morning as accurately as I can recollect them, as far as I can remember them now; I never used any epithet or word of abuse to her; I have said at times in using the word "false," for instance, that I thought she had a false view of some things; when she came towards me for the baby I did not take hold of her and push her out of the room; I did not in my mother's room throw her against the bed or against anything; I pushed her off from me; I did not say to her any of these words, that she should never see the child again, or that she was a vile creature or an indecent woman; I said that she had made a foul charge against me; my mother did not say to her, "Let him take the baby and go; you cannot do anything; let him take the baby;" I did not make any motion towards Mrs. Atherton to injure her; when I left my
180 mother's room I went downstairs into the music-room; I do not recollect that my father and I were in the bath-room that morning at all; I may have gone in there; I do not remember to have been in there with him; as well as I can recollect, it was about an hour after this that I found out that Mrs. Atherton had left the house, possibly an hour and a half; when I ascertained this fact I went first to the Norton Memorial Infirmary on Third

street, next to the house of Mrs. Belknap; I saw Mrs. Atherton there; she came into the room; as nearly as I can recollect, I said to her, "I think this is a bad move on your part, and I want you to get the child and come and get into the phaeton with me and go back home; I say to you now the child will not be disturbed or taken away from you in any way;" she said, "No, I will not return;" I said, "Why?" she said, "I am afraid to come back;" says I, "What are you afraid of?" she says, "I am afraid of violence;" I said, "Mary, aren't you ashamed of yourself to make such a statement as that to me, a woman that has been loved and treated the way you have, and now to say you are afraid of any personal violence;" she said nothing more on that subject; I then repeated my request; she said no, she would not return; then I said, "I intend to have the child, and if you won't come back and bring the child I shall take out a writ of *habeas corpus*, and I will have the child brought back, even if it has to be done by the sheriff, and I will get out this writ inside of two hours; I do not intend to have the child taken away from me in this way;" she still declined to return, and I then said to her, "If you won't come back to the house to remain yourself"—before that she had told me that she had telegraphed for her family and lawyers; that was on Saturday, and they would be there on Monday or Tuesday certainly, probably Monday after-
181 noon, and that she was going to have this thing settled; I said, "All right; I am perfectly willing to have it settled now;" she said, still referring to that same matter also, that when her aunt, whom she had telegraphed for, and her counsel reached Louisville they would doubtless want to see me and have an interview; I said, "All right, I will see them at any time;" I then said, "If you won't come back to the house to stay yourself, come back and stay until Monday, and you can go from our house to the Galt house, where you say your friends will be;" I said, "If you think you have any advantage in coming here and having the child away, you can retain the same advantage; you can come back to the house without prejudice to whatever advantage you may have, if it is such, and I give you my word that you can take the child Monday night and go to the Galt house; I think it is a great pity to have other people in Louisville dragged into our unhappy affairs; if you stay here this thing will be known, and it will create a sensation, and I hope that may not be the case, whatever may be the outcome of our own affairs;" she still declined to come back; at one time during that interview, I don't remember just at what particular time, but toward the latter part, she said, "I will come back if I am to have the sole and entire charge and control of the child and no one else is to interfere in any way;" I said, "I have said to you that no one would try to take the child away; if you want me to agree that I, myself, will give up all control and charge of my little girl, and not have anything to say about her or her management at all, I will not agree to do that with anybody or for any purpose;" I told her during this interview, it was when I asked her to come back and stay until Monday, that the child would not be taken away—
182 I said, "I will go away tonight myself and remain away until

you have gone to the Galt house;" she never agreed to come back except to come back on the condition that I have stated, and I then left the house; I have never had any conversation with her since; I did not say at that time to Mrs Atherton that I would give her one more chance to be a decent woman, nor did she say, "Won't you give me some assurance that the scenes which have gone before will not be repeated," and I did not say, "Damn your assurance; I will give you one more chance, as I said before, to be a decent woman;" I said to her that while she might think she had gained some little advantage by what she had done, if there was to be a separation or settlement at that time, I would say to her that she had not helped her case by what she had done, in my opinion;" Mrs. Atherton may have said something about some assurances of kind treatment; I think she did; I said to her, "You have always been treated kindly in that house by me; the past is enough assurance on that point;" I think that was all that was said; I did not say, "You are an utterly helpless woman, you cannot do anything, I can do what I choose;" I said, "You cannot leave and take the child away with you; I did not say, "If you do not come back I will go and get the sheriff and have you dragged through the streets in disgrace;" I said, "If you do not come back I will have the sheriff take the child into court on a writ of *habeas corpus*."

Q. You heard the testimony here the other day as to what was said on the 3d of October. Did you at that time say to Mrs. Atherton, "I treat you as civilly as I do my other women or other woman"?

A. I did not; nothing of that kind at all.

Q. Did she say, "As your Chicago woman?"

A. She did not.

183 Q. In regard to your coachman whom she overheard in the pantry, is he living or dead?

A. He is dead.

This coachman brought my horses and two vehicles to Chicago in June; I got over to the freight yards about 10 or 11 o'clock; he remained in Chicago that day, that night, and left the next night for Louisville; he came back to Chicago in September for my horses, and my best recollection is that he left the night that he reached there; he possibly may have remained one night then; I could not swear positively on that point; but positively not more than one night either time; my father was not there on either occasion when this coachman was there.

Q. Was there any truth in the charge?

The COURT: Never mind. She don't claim that there was.

I never said to Mrs Atherton that she had married me for my money; I did not believe it.

Cross-examination by Mr. MILLS:

I am thirty years of age; the plaintiff is twenty-seven; she was twenty-two when I married her; I met her the previous March, 1888, at St. Augustine, Fla.; I was not at Clinton after March until

about the middle of June; from that time until October I was there off and on, and quite a good deal during the months of July and August; I saw Mrs. Kelsey's family at that time; I was an inmate of their house, I suppose, as much as three or four weeks of the time from the first of July until the latter part of September; I became acquainted with Miss Ethel Kelsey there; I think she was then eighteen; I have known the plaintiff and Miss Ethel Kelsey
184 from that time until they testified here; I have not seen either of them since the separation occurred until now; at the time of my marriage I was connected with the J. M. Atherton & Co., of Louisville, the corporation, who are distillers and wholesale whisky dealers; I do not think I was at that time an official of the company, but I was active in the management of the business; I was at work at the business all the time when I was able to work; I am now vice-president of the company; they have two distilleries at one place; prior to my marriage I had a long spell of typhoid fever, in the fall of 1886; prior to that time for four years I had been to all intents and purposes practically a well man; there was no chronic trouble of any kind; at the time of my marriage I was much out of health; while at Old Point Comfort I was not in a feeble condition; I had not been from my marriage up to that time in a feeble condition, in the sense that I was not able to be up and walking about all the time, if that is what is meant by the word "feeble."

I said to Mrs. Atherton in the interview at Mrs. Belknap's house that she had never been treated at my house except in a kindly manner; at that time I asked her to return.

Q. And I suppose by that remark you meant that you had never been unkind to her, didn't you?

A. No, sir.

Q. You didn't mean that? You didn't mean to imply any such thing as that to her?

A. No, sir; I had spoken angrily to her when I was angry.

Q. No; answer my question. Had you ever been unkind to her?

A. Will you please state a little more definitely what you mean by the question?

185 Q. No, no; I want your opinion about it.

A. I had never treated her with any unkindness.

Q. Can you answer the question that I asked you—whether you had ever been unkind to her up to that time since your marriage with her?

A. I had never been unkind in the sense in which you ask that question.

Q. So that all your conduct and bearing toward her and your treatment of her had been in perfect kindness, had it?

A. No, sir.

Q. What do you mean, then, by saying that you never had been unkind?

A. I mean this: That except when I was remonstrating with her, or smarting under something which she had said to me, and when

I did reply, sometimes with great indignation and sometimes angrily, that I had always been kind to her.

Q. With those exceptions?

A. With these exceptions; yes, sir.

Q. On those occasions you think your treatment of her was unkind, do you?

A. I think that I was justified in doing what I did.

Q. No, no. Answer the question.

A. Well, if that is called unkind treatment, what I stated just now, then I was.

Q. No, no; don't let us argue it. On those occasions you think your treatment was unkind, don't you?

A. I think my manner on those occasions was unkind.

Q. Do you mean your manner toward her?

A. Yes, sir.

Q. Well, was there any unkindness in anything except your manner?

186 A. Doubtless in my tone of voice.

Q. Your tone of voice was unkind, you think; unkindness in anything else except manner and tone of voice?

A. No, sir.

Q. The words which you addressed to her, then, never were unkind?

A. They were if they had been addressed under different circumstances.

Q. No, no; the things which you said to her, whether in themselves they are unkind or not?

Mr. HUMPHREY: I submit that he has answered that question.

The COURT: He may answer.

A. The words, considered simply as words of the English language might be called unkind.

I do not know on how many occasions I think I uttered words which in the English language might be considered unkind; I am not able now to tell the maximum number of times during the three years that such things occurred; they occurred quite often, especially the first two years; the first recollection I have of anything of that kind was in May, 1889; I was in Louisville in January, 1889; I was at Pensacola and Tallahassee and Pass Christian in February, 1889; beginning with May, 1889, I could in a very few moments tell you the number of occasions of any importance; I think they have all been set out in this complaint; I have not to this time counted them up; these occasions occurred several times during the year 1890, that is, up to the fall of 1890, during the years of 1889 and *and* 1890, and some during the months of May, the last of May and early part of June, 1891, and in October, 1891, at my

187 house; the last of them was at the time she went away from the house.

Q. Well, on any of these occasions did you become angry with your wife?

A. I did.

I was very angry on one or two occasions; I was not in a passion as you might call it; there never was a time when I did not have perfect control of my words, thoughts and utterances; on all occasions and all the times of these troubles I had complete control of myself.

Q. And had not lost the power of deliberation about what you were doing or saying?

A. I had.

Q. You had done that—how many times had you got to that degree of anger?

A. I did not deliberate in what I said to her——

Q. No, no; I didn't ask you that; how many times had you got to that degree of anger?

A. Twice.

Q. Twice only?

A. Yes, sir.

Q. When were those times?

A. Once in March, 1890, and once on the 3d of October, 1891.

Q. You think you lost control of yourself on those occasions?

A. No, sir; I didn't say that.

Q. So that there never was a time when you lost control of yourself?

A. No, sir.

Q. How many times did you get into a state of indignation, as you expressed yourself, towards your wife?

A. Fifteen or twenty times, I suppose.

188 On some of these occasions I was angry as well as indignant; I do not think I could state the exact number of these times when I was angry; I was probably indignant more times than that; I could not state in the three years' experience such as I had how many there were; the occasions of unkindness I have spoken of were those when I was angry or indignant with her; I have given in the course of this testimony my version of these transactions to which Mrs. Atherton alluded as a witness; when she was testifying I recognized some of the occurrences to which she referred; I was able to recall, when she gave an interview, the occurrences to which she referred; I did not say in the course of my testimony that I had given all that had occurred on these occasions.

Q. Well, then, didn't you as a witness tell us what occurred on those occasions?

A. These conversations were——

Q. No, no; just answer me.

A. No, sir.

Q. So that other things were said and done on those occasions from that which you have related?

A. Yes, sir; not of an important character.

Q. Oh, I didn't ask you that, you know; you related all that occurred which you deemed to be of any consequence in this case, did you not?

A. No, sir.

Q. Then you left out some things, did you?

A. I left out some——

Q. Answer my question.

The WITNESS: Shall I answer that question yes or no, your honor?

The COURT: If you can.

The WITNESS: I cannot answer it that way truthfully.

189 By Mr. MILLS: Can't you answer that question?

A. Not and tell the truth and the whole truth; no, sir.

Q. Answer my question, or else we shall be here all the week.

A. Well, that is the reason I didn't answer these questions and tell everything that was said; I do not remember whether I have or not made a reference to every occurrence that I remember, of which my wife spoke as a witness; I do not remember whether I have been asked about all of them.

I never, except upon the one occasion I have mentioned, used any profanity in the presence of my wife; I do sometimes indulge in profanity; I have used the word "damn" under moments of excitement when at work with the men, and other words of a profane nature, but never in the presence of ladies; when I am very much interested in any subject and my emotions aroused in any way, I frequently get upon my feet, and frequently when angry walk up and down the floor; I have also snapped my fingers; I am afraid I must admit that it is a customary exhibition of my anger.

After we got to Old Point Comfort and remained there about two or three weeks Mrs. Atherton suggested going over to New York to see her aunt; her aunt was sick there; not dangerously sick, but under the care of a physician; Mrs. Atherton left Tuesday night and was to return within two or three days; she expected to get back Friday morning; she did not come back, and on Saturday I telegraphed her to meet me at Charlottesville; when I telegraphed her I had concluded to go to Louisville, and at Charlottesville she met me and we went to Louisville; my father came with her from New York; he was in New York while she was there.

190 We reached home from Old Point Comfort just before Thanksgiving, as I recollect it; in the following month of January, there was some talk between me and my wife at a time when I was lying on a rug in front of the fire; I cannot tell what day of January it was; I said to her that I thought if she had been content to have remained quietly at Old Point Comfort with me I would have improved very much there; that I improved the first two weeks, and then she became very restless and wanted to go away—first to Baltimore; I suggested to her that she was responsible because I did not remain and improve more; I did not say any unkind thing to her on that occasion, nor was there any reproach implied in what I said to her; the conversation lasted only a short while; she was not in tears that I remember; my best recollection is that she was not.

On the occasion when we were in the South in the month of February, 1889, when she first spoke to me about going back to Clinton I did not get indignant; but at the talk which occurred in Thomasville in March I did become indignant; I was doubtless angry; but it was more indignation and astonishment than anger; at one time

during the interview my wife was in tears; the interview in Thomasville, I should think, lasted probably half an hour; she admitted that she did not feel so then, referring to my mother, and asked that the matter be dropped; I do not remember whether she was at that time crying or not; she began the conversation about going to Clinton; she wanted to go and wanted me to go with her; it went on from half to three-quarters of an hour; I did not say that she said in so many words that it should be dropped, but that was the gist of the talk; she said she did not feel as she had felt; during
191 the conversation I said some things expressive of my indignation; I do not think, under the circumstances, they were unkind; if I had said what I did without any provocation, it would have been unkind.

Q. Now, what was it that she said that relieved what you said to her of unkindness, in your opinion?

A. She said that she thought that it was a very unusual and unworthy proceeding on the part of a man that he should put his head upon his mother's shoulder in the way in which I had there in Saratoga; she said a great many things——

Q. No, no.

A. Do you want me—do you insist that I shall repeat everything that she said in that conversation?

Q. No. I want you to tell me what thing it was that she said which you thought relieved it of unkindness, what you said to her.

The WITNESS (to the court): May it please your honor, I——

Mr. MILLS: No.

The COURT: He may speak to the court if he desires to. Go on.

The WITNESS: The thing that she said to me that I expressed most indignation about I would rather—you can take the statement for what it is worth—I would rather not repeat in the court-room; if you insist that I shall answer it I will.

The COURT: The court will not insist.

Mr. MILLS: I will leave it there.

She cried because I expressed great indignation; I think there
192 was an examination made of my wife with reference to her condition in May of 1889; I don't know whether it took place on the day of the talk or not; I do not know whether the examination made of me by a physician or of her as to her condition was made first; they were both in the month of May, 1889; the examination of me by a physician showed no symptoms of Bright's desease existing at that time, but a condition of affairs which might eventually result in Bright's disease; Mrs. Atherton came into my room, having heard of that, according to her own statement, from my father; I inferred that she had heard it from her talk; that my father had told her of the analysis, and what it might mean; she had come upstairs to go to bed in her own room; that was the adjoining room to mine; she frequently stepped into my room or into her room—they connected; the first thing she began to talk about was that; the conversation lasted some little time; I do not think I was in bed; I think I was sitting by the fireplace; I was undressing, as I recollect, and she began talking

about that matter; on that occasion she was crying before it was over; I think I know why she cried; I think it was on account of something I said to her; she finally went out of the room into her own room; I do not remember whether she was then crying or not; I said things to her that would have been unkind said under different circumstances, and those things caused her to cry; there was not in that talk any mention made of a letter that had gone to another which was designed for her; my recollection is that the letter had been received at that time; so far as I know she had no knowledge of the letter at that time; I do not know whether I saw my wife again that night, or for the first time the next morning; I was seeing her all the time in that sense; there was a large door between the two rooms; the room in which the talk occurred
193 was the one which I occupied as my sleeping-room; there was a pistol in the room; it was kept in the secretary drawer; it was loaded—kept so; the first conversation in regard to the letter that was intercepted was in the fall of 1890.

In the month of May, 1889, I was not advised positively of the condition of my wife, but there had been some discussion on the subject; it was suspected that there was a possibility that she was in the family way; there was no definite notion given on the subject; I think that on that night when she came into my room in May there was some reference made to the possibility of it, and in this same conversation that we have been speaking of; I do not remember in what part of the conversation, I think along towards the middle of it; I do not remember whether it was before or after she began to cry; I rather think she had begun to cry before that condition was referred to, but I am not certain; I do not remember whether she was crying when she referred to it or not; she went North about a week after that, as near as I can recollect, possibly ten days.

Q. It was when she went North that it was substantially understood or thought that she was pregnant?

A. It was suspected as something which might be the case; it was not definitely known until June.

I first came to understand that it was true in that month, I think about the middle of it; I was aware that the doctor had made some examination of Mrs Atherton with respect to that subject in May; I learned the result of that examination; it was definitely established about the middle of June that she was, when I heard of it by a letter written by my wife, Mrs. Atherton, from Clinton; I do not remember whether I received that news just before I left Louisville for Colorado or in Colorado; I think in Colorado; I do not re-
194 member the day I left for Colorado, but it was along about the 10th of June; a letter apprising me of her condition may possibly have reached me on the way; we may have left Louisville as late as the 12th or 13th; I don't remember the dates; it was along about in that time; it was probably the 15th or 16th, about the middle of June, that I received this news; I don't know that the letter was written in response to any that I had written her; we were of course both much interested; according to my best informa-

tion she informed me as soon as it was known; I wrote her a letter in reply to that one; it is not either of these letters that have been shown me and read here; there was no reference made to the matter in these letters; they were written in the month of June; I don't remember definitely now the date of the first of the four; they are here somewhere; they show for themselves; my impression is that the letter dated June 17th was written from Denver, but I am not sure—the letter shows; I do not remember how long before that letter was written that I had received this information from my wife; since I have been talking about this matter—I do not remember whether I received that information just before leaving Louisville or on my way to Colorado; I don't remember the day; I should say that it was quite soon after my arrival in Denver that I wrote the letter dated June 17th; I should infer from the first sentence in my letter of the 17th that I had received a letter from my wife, the sentence being, "I find your letter of the 11th this morning;" I do not think that I received in that letter the information from my wife about her condition; I think the letter had been received before that, in thinking it over; I do not remember whether it was just before I left Louisville or
on my way to Denver; I wrote my wife every day or
195 two, or every few days; I do not remember in this letter of the 17th of June to have made any reference to my wife's condition; while writing that letter I was probably cognizant of her condition; I do not know that I had it in mind, whether I was thinking definitely about that one thing when I was writing that letter; as I remember that letter, a good portion of it refers to settling some question of deception with my wife; on the 22d of June I wrote her another letter which has been read in evidence; it was written from Denver; I do not remember that there is any reference made in that letter to the condition of my wife; I do not remember whether I had written her any letter between the 17th and 22d of June; the chances are that I did; I wrote to her at more frequent intervals than that; I don't remember; I have not the letter which she wrote to me on the 11th of June and which I received in Denver; I don't remember how long I kept it; there was a good deal of correspondence between myself and wife in these months in 1889; I don't remember up to what time I kept the letters; some letters written during July and August, 1889, according to my best recollection, were kept for some time, and in the fall of 1890 I remember that a number of letters were burned up; I don't remember whether these particular letters were among them or not; I had some special reason for keeping the letters of July and August; there were letters written to me in Chicago which I kept some little time, I don't remember just how long; I wrote a letter to my wife on the 30th of June; in that letter I begin by saying, "Yours of the 25th is received;" I have not that letter that I know of; I do not know what has become of it; I don't remember the contents of it; in her letter
of June 25th, she said as to the charge of deception, I think
196 we had best say nothing; the question of deception came up for settlement for the first time in this correspondence; I

don't remember definitely whether this letter of the 17th of June is the first one about it; I began to write to her about that time in reference to it; it was the first time I asked for a more definite expression of opinion; I wanted to know what her real state of feeling was on the subject; I do not think that there is in my letter of June 30th any reference to the condition in which my wife was; I might have thought of it while I was writing it; I remember that I thought of her condition very often at that time; I don't remember whether I did during that letter or not.

Q. Do you remember when you were exacting from her a settlement, saying that there must be a settlement of this matter, that you were thinking then of this condition?

A. I might have been.

Q. I want to know whether you were or not?

A. I don't remember whether I was or not, sir, at that particular moment.

I wrote the letter that you now exhibit to me dated July 11th, from Denver, Col.; some of that letter is on the same subject; I state my movements and my reason for them; the next thing is this question about having this question of deception settled; it is with reference to asking her the question whether she believed it or not; I do not remember whether I had had another letter from her or not in which she asked me to say nothing about those things and let them pass by and have no discussion about them; in her letter of June 25th she said in regard to the charge of deception that I had best say nothing about it; that nothing further had better be said about it; I had
197 doubtless written her letters between the 21st of June and the 25th of July; unless I could see the letters I do not remember the exact contents of them; I do not remember whether in this correspondence I did mention that to her or not; I asked her how she was particularly; on that particular subject I don't remember; I was always solicitous about it—always; I have no letters of hers except those that I referred to yesterday; during the interval of these letters to her I do not remember the contents of any that she wrote me further than some quotations that are in those letters; the letter you exhibit to me, dated the 16th of July, was written by me to my wife; it is in reply to a letter of hers dealing with that subject, consisting of ten sheets, about twenty pages, and was written in reply to a letter which Mrs. Atherton had written me; I haven't her letter; I don't know where it is; I remember part of its contents; I remember it, not only from looking at this letter, but I stated what were its contents before I saw that letter yesterday; I do not remember the date of it further than inferring from the date of the letter that I wrote; my best recollection is that she said in her letter that she did not believe that I had practiced any deception upon her; I do not remember that there was anything in her letter of the 6th of July as to her condition of pregnancy; another part of her letter to me, as I recollect it, was that she said she did believe that deception had been purposely employed by my friends and family; I don't remember whether she called them by name; I think the sentence is quoted in that letter; I think that it is what

I stated yesterday to secure her consent and the consent of her parents to the marriage; do not think I can give anything else; the letter you now show me is in Mrs. Atherton's handwriting;
this letter was written on July 6th, and forwarded from Iron
198 Springs to Manitou, and then to the Albany hotel, Denver,
and then to the Richelieu, Chicago; I think that is the letter to which I refer in my letter.

CLINTON, NEW YORK, *July 6th*, 1889.

"MY DEAR PETER LEE: I do not believe that you willfully deceived yourself or me as to the state of your health at the time we were married; but I firmly do believe that your father, mother, and Dr. Bodine purposely concealed from me and my family, and also from you, that you were very ill. This belief has been strengthened by statements made by members of your family, both at the time of our wedding and afterward. One statement made by your mother herself, in strictest confidence, capped the climax. Should you insist upon knowing just what was said and by whom, I will write to your mother for permission to break my promise. I exonerate you from any intention of concealment. Nothing could ever make me believe that you had not all love and consideration for me at that time. As to the absence of outside influence in your life, I must believe what you say, though the often-repeated words of your mother show that she feels she has much influence at any rate. You remember that she told me that she kept you from following me to New York from Old Point Comfort, and at other times has said the same sort of thing.

"I am glad no one tries to interfere between you and me, for then I am sure all will be well with us.

"Now, in my turn let me ask you some questions. To what does all this lead; what good end do you think your letters will accomplish? What is your motive or scheme in writing this way? I do not understand you. You say *I* reopened all this by letters from
Clinton. Will you kindly send them to me? I am always
199 ready to say '*mea culpa*' when I feel in the wrong. One
thing that is very foreign to your usual tenderness in this persistent attack. I can only hope the effect of your forgetfulness will not be disastrous to *me* or any one else, and is it quite safe for you to write to me as you do? You threaten me with 'loss of love and respect if I persist in unjust accusations.' Are you sure of my unwavering forgiveness and unchanging love? This matter which you have brought up is not what has been our bone of contention. You know very well what has hurt and wounded me. Your ill health, while I have grieved with you, was not what would have made my marriage vows mere words and form. Sober as it makes this part of our lives, it is not the hardest thing to bear for me. It is useless for us so far apart to try and settle our future lives. Come to me, my husband, and face to face we will say what must be said.

"I am fairly well, and hoping always that Manitou is doing you good. When do you plan to come East? Mama has a plan

for closing the house for a time, if you should not come. Hoping all good things for you, I am your

"WIFE."

My letter of the 16th was doubtless in reply to that letter. The sentence in her letter, "I firmly believe that your father and mother and Dr. Bodine purposely concealed from me and my family and also from you that you was very ill," I think is the matter that I sought to give yesterday when speaking of the contents of this letter on that subject; I did not suppose when I was testifying yesterday that I was giving all that was in the letter; I attempted to give yesterday the substance of one sentence; I do not know whether there is any other sentence bearing on
200 that point in there or not; I did not know what the sentence in her letter, "one thing that is very foreign to your usual tenderness is this persistent attack," referred to, for I was not making any attack; I had an idea that it referred to my letters beginning on the 17th; I think it referred to what was in these letters; I know of nothing else that it could refer to; I observed this sentence in the letter: "Is it quite safe for you to write me as you do?" when I received it and knew what it referred to—to Mrs. Atherton's condition; I do not think I made any reply to that sentence; I was trying to settle this other question, trying to understand that; that is the last letter written on the subject; I then went to Clinton; I said at the end of my last letter that if she would meet me at Utica we would go to Richfield springs; I wanted to see her face to face; I wanted an answer from her face to face, as to her feelings at the time we were married; I wanted to get this settlement; this is the reason I asked her to come to Utica instead of my going to Clinton; I wanted to see her by herself; I was satisfied on the point of deception so far as what I had done myself; I was not, however, satisfied on this subject; I was not satisfied to stop the discussion when she said it would result in no good; I was not satisfied to stop the discussion when she said that it was best to say more about it.

By the COURT: Let me ask you a question. In August, your wife, when you met her, admitted to you that she was deceived when she married you as to your health, not by you or any intentional wrong on your part, but that she was deceived on that subject. What were you going to do about it? She was then soon to become the mother of your child. What were you going to do about it? Suppose she had said right out and out, "I was
201 deceived by your father or mother, both of them, or your uncle or your aunts, or by my uncles and aunts; deceived by the whole parcel of them as to your health when I married you."

A. I can only answer that in this way: That if she had said that she was deceived; that she married me because she was deceived or she would not have married me; that she would not have married me had she known the true facts; I should—I don't know just what

I would have done under the immediate circumstances, but after the child was born I never intended to live with her as my wife.

Q. Suppose she had said that, even; and then you were satisfied that she loved you truly, sincerely and heartily, and taking into consideration that there was about to be a little baby in the case—there is the question.

A. If I had been satisfied that she meant what she said when she stood at the altar and married me, and that she did not marry me because she was deceived, or that she would have married me had she known all the facts, in sickness or in health, for better or for worse, I would have been the happiest man in the world.

Q. You had no idea but what when she married you she loved you?

A. I did have very serious doubt that she loved me in the right way when she married me; I had had that doubt aroused in my mind a very short time before; she told me once that she had very little respect for me at the time she married me—I have not wanted to state some things here—and had had very little since; I said to her, "Why in the world did you marry me then? Why didn't you have the courage to come out and say so before our marriage?"

She says, "I ought to have done it; I ought not to have married you feeling as I did, and in marrying you feeling as I did, I did you the greatest wrong that a woman can do a man;" I will swear to that.

202

In response to question by Mr. Mills, witness continues:

She said to let that subject drop; when I arrived at Clinton in 1889, I talked to my wife very little about this subject; I did some; made some brief reference to it, but I said, "There will be no pressing of this subject under the circumstances;" I did not intend to press it when I went to Clinton, because I went in reply to this telegram; I said on yesterday that I said to her that I had intended to press this subject, but that now nothing further would be done until after the child was born, but I did not state then that I then intended to press it; I do not know that I was prepared to state my intention six months in advance what I intended to do at that time; it depended on what occurred in the meantime; I had a talk with Mrs. Atherton when I came to Clinton, learning that she had had a fall and been hurt; she was in bed; I think probably she did cry a little on that occasion; she cried very easily on those subjects; I do not remember whether she cried on account of anything that I said to her; it may have been something about her mother; I remember that I said nothing unkind to her on that subject; I stayed there at that time two or three days; I talked to her the afternoon I got there; she said at some one time that she was misinformed as to the condition of my health; my recollection is that the first day I reached there, there was no talk between us on that subject, that whatever reference was made to it was the next day; she was then in bed until I went away, with the exception of a few moments when she came into her aunt's room; I do not remember whether I spoke to my wife about the fact that I had written a letter to Mrs. Kelsey; I

203 spoke to Miss Goodenew; in my direct examination I did say that my wife said to me that I ought not to have written to her mother as I did, and I said she ought not to have written to me as she did; this was with reference to some letters about the house; I understood you just now as asking in reference to a letter that I had written Mrs. Kelsey from Chicago; the letter that was referred to between myself and my wife was a letter I had written Mrs. Kelsey from the West, probably from Denver; I think towards the latter part of the conversation she began to cry, and that the crying was caused by something which I said in reference to her mother; she was then in bed, sick; I was not angry; I displayed no temper, as I recollect it; I may have displayed some irritation, and probably it was what I said at this time that made her cry; I went from Clinton to Saratoga to see my mother; I was in Clinton during August and most of September, 1889; I had some talk with my wife in my room which Ethel Kelsey evidently overheard, and my wife told me about Ethel having said that I had called my wife a little nigger; Ethel was occupying a room immediately across the hall; my wife spoke to me about what Ethel had overheard; she said that Ethel had said she had heard me call my wife a little nigger; my recollection is that it was several days after I had made the remark; I do not remember to have seen Ethel about the time that I had the conversation in which the term "little nigger" was mentioned; I do not remember whether she came to the door or not; I suppose I must have been speaking in a loud voice if I was heard in the hall; I do not think on that occasion that I was in any kind of excitement; as I recollect I was very much interested in some subjects, and speaking, as is my custom under those circumstances, in a loud and emphatic tone of
204 voice; I do not think I was mad, as I recollect it; my recollection on that point is not very definite, except on one point, that I did not call her a nigger; I do not remember whether I ever had any talk with Ethel on the subject afterwards; I exhibited some feeling that she should not have corrected Ethel; the conversation in which I said I had better go out of the house took place in the room I was occupying; my wife was present; I am under the impression that it occurred in August or September; I do not remember Prof. Kelsey being there at all at that interview; I was talking with my wife when Mrs. Kelsey came into the room; she came up because she heard us talking; I do not know where she came from; I presume she heard voices, for she asked me what this was about, or what we were talking about, when she came in; I was talking loudly; I was quite angry at that time; she was crying because I said I was going to leave the house; I do not recollect that there had been any crying until I made that statement; I do not remember exactly how long that conversation lasted; the conversation between my wife and myself terminated when Mrs. Kelsey came into the room; I do not remember that anything was then said about this charge of deception; that was the time when her parents were spoken of, especially her mother; I do not remember that there was anything said about her father at that time; I do

not think that was the time that I spoke of their getting money by breaking wills; when I said I would get out of the house I was pretty mad and very indignant; it made Mrs. Atherton cry; I knew that she was then pregnant; probably I thought about it at the time; doubtless it went through my mind; I was aware of it; I don't know that I thought of it specially at that time, but I was aware of it at all times, and I knew it then; when I opened my trunk and
205 put my things into it I was indignant and angry; I was doubtless talking at that time; I asked Mrs. Kelsey if she would not leave the room; when I said to Mrs. Atherton that her family had gotten money by breaking wills instead of by labor or work, I was a good deal piqued and hurt by what she said; I was somewhat mad—mad at her; my recollection is that this was after the child was born; I am not positive; I think it occurred in Louisville, but I am not positive on that point; I do not think that was the time that I called her father a cur; my best recollection on that point is that I used the word "cur"—it came out—I says, "Your father is a cur;" I turned around from her and used the word "cur;" when I used it, it in my mind referred to her father; I was very mad; I was thinking of the charges he had made against me; Mrs. Atherton was in the room; I am not positive as to the place; I am rather under the impression that it was either at Louisville, just before going to Cresson, or at Cresson—I am not sure; this was toward the end of the discussion; I had just turned around to leave her; I don't remember whether she was crying or not; when I seized Prof. Kelsey by the hands in the way I have described, Mrs. Atherton was present; she said, "Oh, Laddie, don't hurt him;" I was very mad; I said that he should have respect enough for me to listen to me; in taking him by the hands that was my sole purpose; I was mad, but I had no intention of hurting him; I never advanced upon her father upon any other occasion in that way; I do not remember that my wife did cry on that occasion, or that she cried at all during that interview; my best impression is that she did not; she was somewhat affected; the date of this was the latter part of March, 1890, Sunday night, about seven o'clock; it was after
206 I had been to Clinton on the date of the child's birth; when I went to Clinton on that occasion I think it was soon after the first of the year, 2d or 3d of January; I think I got to the house about half past five; I found Mrs. Atherton occupying a room on the third floor; it was a comfortable room; I began to talk to her about the quarters she was in; what I said was in rather a critical mood; I thought great disrespect had been shown to me by her parents in putting Mrs. Atherton in that room; I did not think they had considered me at all; I was somewhat dissatisfied with it; I complained to Mrs. Atherton about it very briefly—about this particular subject; it was part of the same conversation in which I complained to her about the presence of the two young men in the house; she replied to me that she was to occupy another room pretty soon—as soon as the young lads were gone; thereupon I said that I did not think it was delicate for them to be there; the conversation was continued along some little time; I do

not remember that the subject of deception that is in those letters was referred to at all; it was in that conversation, a conversation on that night, that I said I was going to New York and wait until the child was born; that came upon her telling me that she was to be in a room on the second floor in the front of the building, and that I was to be in a room on the same floor in the rear; I complained of that; I was not specially mad; I didn't like it, and I was somewhat out of humor about it; I talked in a moderately loud tone of voice; I *I* did not make any other manifestation of anger than loud talk that I remember of; I don't remember whether I was sitting on the bed or sitting on a chair or walking; all this talk about the small room she was in, and the presence of the two young men there, and the room that I was to occupy, and
207 my threat to go away was all in one conversation on that first night; I then expected that my child would be born in eight or ten days; she said she had some pains that night; she told me after the conversation had ceased; she was crying then; it was in the latter part of the conversation that she began to cry; I suppose that conversation extended over a period of time of an hour to an hour and a half; it began soon after I reached there; I got there about half past five o'clock; there was some conversation before supper and some after supper; she got to crying after I had been talking perhaps half an hour, and then at intervals crying and talking, and I was then trying to get her quiet after she began crying.

Q. You at some time during that talk threatened to go to New York?

A. I said that I had just as well go down to New York under the circumstances if the arrangement which she contemplated was carried out.

I do not remember how long it was after I went up and began this talk that it was before I said this; I think I had seen my wife about two or two weeks and a half before this; I am not positive; I had been in the meantime to New York and Louisville; the subject of a separation was not talked of except as would have been involved in my going to New York between then and the birth of the child; after she had been crying some little time that night she said she had some labor pains; my best recollection is that these pains did not continue a great while; there was no doctor sent for that night that I recollect; I said to her, when she complained of these pains, that if she was in any severe pain that I would go down to the village for the doctor myself; she said that she did not think it was necessary; the pains stopped; I don't think I said any-
208 thing to Mr. or Mrs. Kelsey about the quarters that were occupied by me or my wife on that occasion; the arrangement was changed the next morning; I went to Utica that morning; when I came back other arrangements had been made; the boys went away the next day; they were there one night and the following day and the following night and then went away; my wife had written me before I went to Clinton that they were to make the visit; I have not got her letter; I remained there until after the

birth of the child; there were several occasions on which I talked to my wife quite emphatically about Mrs. Neary's management of the case; I remember that; that began very soon after the child was born, I think within a day or two, as soon as I had time to observe the methods employed; my wife was in the bed; I talked emphatically; sometimes I had the door closed leading into the other room, and sometimes not; I frequently closed the door and went in to talk with my wife at her own request; I did not say that it was always at her request; I said frequently at her own request; sometimes I closed the door of my own accord; the nurse was on these occasions in the next room with the child; any one in the next room could have heard even any ordinary conversation from one room to the other; it was a frame house, and the door was a light frame door; you could hear voices if the voices were ordinarily loud; on one occasion I was excited and had a good deal of feeling, and was somewhat angry; the child was between two and three weeks old, as nearly as I can recollect; I was talking to my wife at that time; when I was talking to my wife in regard to the operation being performed I was more hurt than angry, if I was angry at all, it was very little; as I recollect there was only one talk with my wife about the
subject of the operation being performed in New York
209 city, and that occurred at Clinton; she did not go with me
from Clinton; I went alone; I went to Saratoga the next day after that talk, then back to Clinton a part of one day, and then to Louisville, so that at the time of that talk the child was about three or four weeks old; I do not remember which one of us started the conversation; some reference was made to the possibility of the operation having to be performed; it was not a trouble of old standing; it was by reason of a laceration occurring at the time of the birth of the child, which was not discovered immediately; Doctor Ford had been sent for; nothing about New York was any suggestion of his; Doctor Ford's opinion was asksd as to whether anything could be done at that time; not only was the possibility of the operation having to be performed talked about in this conversation, but also her remaining at Clinton until May; it was her remaining at Clinton, it was not Dr. Fordyce Baker that irritated her; I was not angry at any time during that conversation; I was irritated for a moment when she said she would go without my wishes; as I consider the definition of the word anger, I was not angry at all during that conversation; I do not remember that my wife cried while I was in the room; she was not crying when I went out; I went to Utica that day and I was told by Mrs. Kelsey on my return from Utica that afternoon that my wife had been crying while I was gone; this conversation between my wife and myself occurred just before lunch; I went to Utica just after lunch; on my return from Utica I went up to my wife's room; I did not see any indication of her having been crying; Mrs. Kelsey told me when I got back that I ought not to talk to her so as to make her
cry; I told her that I had said nothing to make her cry; I
210 think it was unkind to say to her under those circumstances
that she would pay her own expenses if she went to New

York; I thought so very soon after I said it, and was trying to explain that to her when Mrs. Kelsey came into the room; this was after I came home from Utica; on my return I went up to my wife's room and was talking with her again when Mrs. Kelsey came into the room; I had been talking about a minute when Mrs. Kelsey came in; I do not know whether she heard me talking; I was talking in a very low tone of voice; a few minutes after Mrs. Kelsey came into the room the Professor came; there was very little said in my wife's room; my wife was in bed; I went out just as quickly as I could, and got hold of my trunk; that was the occasion when I took my trunk out first; I do not know where the nurse was.

On the occasion of the occurrence with Miss Kelsey at the depot in Louisville I was not angry; that was in 1890; Miss Kelsey said to me she wanted me to be kind to Mary; she expressed that idea; that was after the interview in March when Ethel Kelsey was present; in regard to the occurrence in March, 1890, there had been an interview between Mrs. Atherton, Miss Kelsey, my father and myself in the forenoon; that was quite a lengthy interview; I did not attempt in my direct examination to state everything that was said; from that interview I went to my office; I was telephoned for by Ethel; I did not go home, but asked my father to go; I then went up to lunch; I saw my wife; we were not alone at lunch; I saw her before lunch when we were alone; she was not crying then; there was no other interview in that afternoon; I did not see her at supper time, but after supper I did see her; I went to my office in the afternoon, and came back to supper; she did not come down to supper; I did
211 not go up before supper; the supper bell had just rung as I came in, but I was called later in the evening; I heard screams on the third floor; that was after supper; I thought I knew who was screaming; after that Ethel came downstairs; I was not called by her; she came down to my father's room where he and I were sitting; I had stepped in there for a moment after tea; I think we heard the screams just before she came; I did not go up until after Ethel came; she was there twice; the first time I requested my father to go up; I told him I couldn't do any good; he went up and came back and said he couldn't do any good; thereupon Ethel came down again, and said that my wife said if I would come up she would be quiet; I went up immediately; I found her in hysterics and a great passion; I do not know what caused her hysterics; I can't give any opinion about what was the cause of it further than what had occurred; if there was any cause at all, it was something growing out of the interview that morning; I think it was entirely without cause; I think there was nothing which should have produced it.

I recognize the handwriting of this letter; it is that of Mrs. Kelsey, my wife's mother; it is addressed to me; I received that letter at the time of its date.

Redirect examination by Mr. HUMPHREY:

Q. At the beginning of your cross-examination you were asked if you had ever been unkind to Mrs. Atherton. Were you or not ever intentionally unkind to her?

A. I never was; my feelings towards her were never unkind.

Q. Will you please to explain what any unkindness consisted in?

212 A. What might be termed unkindness consisted in my expressing to her my disapprobation of things that she would do or would say, and whatever language I used was directed entirely and had reference entirely to these acts of hers, and not to herself; for her herself I always had the kindest feelings; I had an intense interest in her, and in many instances used forcible expressions to try to produce some impression on her to show her what I meant and how certain things affected me; a great many of the talks that I had with her grew out of the intense love and interest—my love for her and my interest in her—and to have her try to understand how certain things she said would wound me and make me feel, and to avoid a repetition of them in the future if possible.

By the COURT: Is that still your feeling toward her?

A. No, sir, it is not; I have no feelings of unkindness now, however, if I am allowed to state.

By Mr. HUMPHREY: What are your feelings toward her?

A. My feeling now is, sir, of the most intense regret that this whole thing should have ever occurred; I have no feelings of bitterness or of unkindness now toward the plaintiff in this action; I have no feelings of love for her as matters now stand—as they stand today; I love the woman as she was to me once, but not as it stands now.

Recross-examination by Mr. MILLS:

Q. About when does the distinction in your feelings date from?

A. Beginning at the time of the separation.

Q. That is the time?

A. Yes, sir.

213 Q. Then your feelings toward your wife changed at the time of the separation, did they?

A. They began to.

Q. At that time?

A. Somewhat—yes, sir.

Q. And your disposition toward her began to change then, did it?

A. What do you mean by that, exactly? I don't understand; I don't mean to quibble with you; I want to understand your exact meaning.

Q. Well, your disposition toward her.

The COURT: Do you mean the same thing as feeling?

Mr. MILLS: Not exactly.

The COURT: Well, I don't quite get the distinction.

Mr. MILLS: Up to that time there had not been the change in your feelings that you speak of, had there?

A. No, sir; there had not.

Q. Up to that time your feelings toward her had been those of great love and devotion?

A. They had been—yes, sir; of great love and devotion.

Q. Constantly?

A. Yes, sir; they had been so constantly; my exhi-tion of them had not been constant.

JOHN M. ATHERTON, sworn for the defendant and examined by Mr. Humphrey, testifies as follows:

I live in Louisville, and am the father of Peter Lee Atherton, who is my only child; I know the plaintiff; she came with her husband to my house from their bridal trip; I was present at their marriage;
214 I remember in 1889 of communicating to the plaintiff the result of an analysis that had been made in reference to my son; that communication was made in my wife's room; I said to her that there had been received, either that day or the day before, an analysis made by a physician which showed his condition to be quite unsatisfactory, and if certain symptoms that were brought out by the analysis continued for any length of time that it would indicate a serious and a fatal disease; I went to my son's room that night; I went, I think, about 11 o'clock; I knocked on the door, my son said, "Come in," and I opened the door and went in, just inside the door, and made some remark about some business matter, I don't remember what, irrelevant to this entirely, and then I said to him, "I am afraid you won't improve much in your condition, being up until this time of night;" I did not see the plaintiff at that time; the doors were open between the two rooms; she had a connecting room; I did not say at that time, "Peter Lee, what the devil are you doing?" I said what I have stated and nothing else, and went out of the room downstairs; my son did not have any pistol and I did not see any; my son was partially undressed; I was at my house in Louisville in March, 1890, when my son and his wife were there and Miss Ethel Kelsey; my wife was not at home.

Q. Will you now state as concisely as you can any interview which you had that day with the plaintiff, your son and Miss Ethel Kelsey, that morning?

A. I went upstairs, I think, at nine o'clock in the morning, having heard some talking in the hall; I walked into the front room, the door being open, asking my son to come into the room with me, and stated in the room to the two that I wanted to have a talk with
215 them to see if I could accomplish anything in removing the troubles between them; that I had never said a word to the plaintiff with reference to their family troubles and felt, as the father of the one and the father-in-law of the other, that I was not doing my duty if I did not try to remove these subjects of misunderstanding; of course I cannot now state just at what particular point any one thing was said, but about that time—I think I

had just begun to talk—Miss Ethel opened the door and came into the room; I said to her, calling her by name, "I have asked this interview between these two people to see if by a talk with them over their troubles I can assist them to a happy life," or the equivalent to that, "and I would therefore talk to them alone, and ask you if you will please to retire;" she said no, or the equivalent of it; I expressed surprise and said, "I think that this is rather impertinent that you will not retire, as I desire to talk to them alone for this purpose;" she replied that she would not go unless her sister wanted her to go; I don't know that her sister said anything, but she did not indicate that she did want her to go, and she remained; then substantially what the defendant said this morning, I being present occurred; he related or said about, as I remember it, what he said on this witness stand that he said; I then commenced my talk with the plaintiff, telling her the interest I had in the matter, having but the one child, and always wanting a daughter, and especially with a little granddaughter, that I hoped these troubles would disappear, and if they could reach an understanding as to the effect which certain things had in producing these troubles and cease from the repetition of those things that I saw no reason why they should not be happy; I then told her about what the defendant said on the witness stand, or what he had told me of the conversation in Thomasville between his wife and himself with reference to the Saratoga event and the influence that it had
216 had upon the plaintiff's feelings at that time and down to the time of the Thomasville interview, and explained to her, as I thought, that this was very well calculated to make trouble, as it would likely be offensive and unpleasant to her husband, and, I feared, had put her in a state of mind to do what otherwise she would not do, and then, without taking up the time, having heard the defendant testify on that point in the conversation that I have related.

Q. (Interrupting.) That is to say, you heard the defendant testify?

A. Yes, sir; I heard the defendant testify here on the witness stand; and I explained to her that if that statement was made to a third party or to the public, that she had been offended, and had been for months before, because of his love towards his mother and nothing more said, it would scarcely be believed that any woman could become offended at her husband's love for his mother, and that it must be supposed that it was caused by something which her modesty forbade her to say, and on, about as the defendant stated on the witness stand.

Q. Did your son use any violence toward his wife on that occasion?

A. About that time or before; I don't remember the moment because I was talking with her, that is, I don't remember these little incidents, she went out of the rear of the two connecting rooms into the front, the plaintiff, her sister, Miss Kelsey, following her; I followed the two into the front room, my son following me; the two ladies moving to the right of the connecting door and my son

and myself to the left; continuing the conversation about as the defendant testified here; at some point, just at what time or at the break of what sentence I don't remember, the plaintiff in
217 very great excitement and apparent determination, with a look on her face of anger, and resenting more or less what was said to her, started toward the door of that front room connecting with the hall; the defendant was sitting on the bed, and as she started towards the door he stands up, puts his back against the door and asked her not to go away, but to stay and listen to what I wanted to say to her and see if any good could result from the interview; she moved on very near—probably two or three feet from him and not more than two or three feet from me, having passed me in going toward the door; when he did not move from the door but begged her to stay, she turned around in great feeling and slapped her fists together (witness illustrates) within a foot or two of where I was standing—"Two Southern bullies, bullying two helpless girls," or "two helpless women," and I said to her at that instant, "Mary, aren't you ashamed to say such a thing as that when you know that I come here to plead with you for peace and reconciliation, and have talked on that line since I have been in these two rooms;" her husband, the defendant, did not even touch her, much less to do violence, nor did either one of us during the interview speak a harsh, severe or sharp word.

Q. Now, I will ask you whether during that interview, without going over it in detail, were there used by you any insulting epithets or any coarse language of any kind, either by yourself or son?

A. No, sir; there was not; not a harsh or unkind or severe word, nothing but tones of pleading and begging for peace and reconciliation; now, I beg your pardon, I did speak sharply to Miss Ethel Kelsey; I am now confining my statements to the plaintiff.

Q. Did you say anything at that time about a divorce or a separation between these parties, or did your son?

218 A. There was nothing said on the subject of a separation except with reference to the very great unhappiness that would result if these troubles continued until the two did not live together as man and wife, but that that ought never to occur, and that these troubles ought to stop; that that condition should not be brought about.

Q. Was there anything said about divorce except as you have just outlined it?

A. Not at all. The word divorce was never used.

Q. Did you say anything about your pecuniary powers over the judges of the State of Kentucky or the city of Louisville?

A. Oh, no, sir; not a word.

Q. Did you say that you had come up there to be a witness for your son?

A. I did not. I would not likely have announced it if I had.

Q. Did you say that you were going to take the baby away from her, and that she was not a fit woman to have her, and that she was a dirty creature, and that you would turn her a disgraced woman into the street?

A. No, sir.

Q. Now, after this interview you and your son left the room?

A. We went directly to our office.

Q. What occurred in reference to your returning to the house?

A. In some short time after we reached the office, I don't remember, maybe twenty minutes or half an hour, or maybe longer, but not a very long time, the defendant came to me and said that he had been telephoned for by, I think, Miss Kelsey, asking him or saying to him that his wife wanted him to come home. He asked me to go.

219 Q. Did you go?

A. I did go.

Q. Did you see Mrs. Atherton?

A. I went directly to the residence and up into the third story and found Mrs. Atherton, the plaintiff, sitting in the same room where the interview that morning had commenced. She was sitting on the side of the bed with the little baby in the cradle by the side of the bed, crying and weeping violently.

Q. That is Mrs. Atherton?

A. Yes, sir.

Q. Was Miss Kelsey in the room?

A. No one there but the plaintiff; I walked in the room and sat down on the bed by her side; put my arms around her and kissed her and asked her what she was crying about; she said that the defendant, "P. L.," or "Peter Lee," as she often called him, one or the other, was going to take her baby away; I said, "Mary, now you know that he has no thought of that; that that subject has been mentioned—was mentioned this morning only as the result of a sad contingency if you and he did not avoid these misunderstandings; that if you are not willing to let all these difficulties drop and identify yourself with your husband and his home and his life; that that is the only sense in which that was referred to in that interview," and she asked me if I would talk to the defendant; I said to her, "It is not necessary for me to talk to him; I assure you that he will be as happy a man as there is in the world if you will now quiet down and tell me that you will let all these troubles pass out, all these recriminations and complaints and especially if you will be satisfied with your husband and your home life, if you will agree now with me that I shall tell him that there will be

220 no trouble hereafter, certainly not on his part;" then, I won't take the time to repeat it, but I talked to her a good deal in a similar strain to that of the morning about these points that have been testified to, about his relations with his mother, and his health and one thing and another of that kind, and finally she stopped crying entirely and said, "Now, I will let it all go; I won't renew any of these things; I will be happy and satisfied, and you tell P. L."—that is, the defendant—"this for me."

Q. You left the room then, and where did you see your son?

A. I left the room then, she quiet and bright and apparently was over the trouble; my recollection is that very soon after that and before lunch she sent for me and I went upstairs again and she

was then in the front room of those two connecting rooms, lying on the bed, quiet and composed, and said, "I want to ask you if you are willing for Ethel to remain;" I understood her reference being to what had occurred in the morning; I said, "Certainly, I want her to remain, and will do everything that I can to make her visit pleasant, and will be glad to have her stay on your account;" she said, "I ask you this because we this morning telegraphed our father to come," and she said that they had either telegraphed him not to come or wanted to telegraph him not to come, but that was the substance of the question she asked me; I then went downstairs and in a little while the defendant came in from the office; I spoke to him below and went immediately with him to the third floor, and the plaintiff was then in the corner room across the hall, there being three rooms on that floor. I went in with him into the plaintiff's presence and told him in a few words of the interview that I had had with her alone, and that she had told me that she would be happy and contented, and he
221 put his arm around her neck and she kissed him and they kissed each other, and I walked out of the room and left them alone; we four were at dinner, or lunch, or whatever you may call it, a few minutes after—that is, my son, his wife, Miss Kelsey and myself; everything was as bright and pleasant and cheerful as it had ever been at the table; my son and I went down town after dinner and returned together about supper time; the supper bell rang a few minutes after we entered the front door; we were a little late; we waited at the door of the dining-room for the ladies, the plaintiff and her sister; in a minute or two Miss Kelsey came down alone and on approaching us and moving into the dining-room I said to her, "Where is Mary?" She replied, "She is sick and does not want any supper," and we three sat down to the table and not very much was said, and I don't think, if I remember correctly, very much food was taken by either one of the three; Miss Kelsey was first from the table, and afterwards myself and son got up from the table; in a few minutes after Miss Kelsey went out the defendant and myself walked upstairs to the second floor, I going into my room, which is near the head of the steps; as I went into my room, as I remember, the defendant followed me, passing into the room; I heard screams and cries and wails from the floor above; we had just stepped inside of the door, and were standing there for two or three minutes, maybe but only a very few minutes, maybe one or two or three, when Miss Kelsey came down from the third floor and said to the defendant, "Won't you go upstairs and try to quiet Mary, who is crying?" and immediately went back upstairs on the third floor; the defendant said, "Father, won't you go up and see Mary?" I walked immediately upstairs and found her lying on the bed in her wrapper in the front room of the two con-
222 necting rooms, and Miss Ethel Kelsey standing by the side of the bed; the plaintiff was very much wrought up, in intense nervous excitement, and looked almost like a person ready to pass into convulsions—of which I had seen a good many—drawing her face up and her mouth back and screaming; I took hold of her

arm, really to feel her pulse, and spoke to her; she pulled her arm away, and I don't think spoke to me while I was in the room; I said to her, "Mary, get quiet, or you will work yourself into a bad condition;" still she would make no reply, but would scream; I said to her, "The neighbors will think you are being murdered in here; don't cry so;" in a little while I said to Miss Kelsey, "Can your sister take morphine?" She said she didn't know; I asked her if she had ever taken it; she said she didn't know, and I did go downstairs and get a quarter-grain tablet of morphine and brought it up into the room and asked her sister if she would give it to her; her sister made the effort, asked the plaintiff to take the morphine, but the plaintiff wouldn't take it; I remained there a few minutes, I don't know, five or ten minutes, but the same thing continued, and I went back downstairs into my own room, where the defendant then was; in a little while afterwards, maybe five or ten minutes, Miss Kelsey came down to the same room again and said to the defendant, "Mary says if you will come upstairs she will cease crying;" the defendant went out of the room instantly, walked upstairs, I heard his footsteps in the hall above, and I heard nothing more; Prof. Kelsey came to Louisville the Sunday after that.

By the COURT: Did you hear the testimony of your son upon that subject?

223 A. I heard it, but I was not paying a great deal of attention, but I will state it in about a minute; I had been in the room with him some little time; I went to the dining-room—in the *the* first place I had asked him in the presence of all of them to come in to supper; he had been at dinner, but he said he preferred to go to the Galt house; I insisted on his coming in to supper and staying all night, but he said, "No;" so he and I went into this room; after a little while I came out of that room and went into the dining-room and called the defendant, and went into the room with the Professor a little while after that; in a few minutes I walked to the dining-room and called the plaintiff, and the four of us were in the room, and I shut the door.

Q. In the meantime conversation was going on which you do not give?

A. Which I do not give in there, nor any part of it until this point; when the plaintiff came in her father was standing, as I remember it, by the library table, facing the door, and I told her then that I had asked her father into the room and asked him to cooperate with me to remove any troubles between these young people; in that conversation—and I only made one or two statements—her father said the defendant had treated his wife like a brute when she was in a delicate condition, and I told him to his face when he made that statement that he was a damned liar; I regretted the use of the language, but felt justified in it; I said to her, "Now, Mary, under a condition of this kind if you were my wife I would want you to decide this matter; if this charge is true your husband is unworthy of you; if it is not true you ought not to permit these things to be said about him, and I think you ought to take your

stand now;" she walked over by the side of her husband and
224 put her arm in his; in a few moments they turned and she said in a rather low tone of voice but audibly—I was standing within a foot of her father—"Father, did you make that statement?" he says, "I did;" she says, "You ought not to have done it; it is not true;" in a little while afterward I said, "Mary, I have asked your father to state why he made this charge against the defendant, my son, and he declines to do it," and I think the defendant said that he did then, or had before—repeated it—that he asked him to make an explanation and he declined to do it; "Now," says I, "if you know, won't you tell us to what your father refers?" we had moved around then, and I was sitting down with her father and the defendant appealed to her also to state if she knew; she referred to the first night that he got to Clinton, when she said that the defendant came there and complained about the arrangement of the house, he being off in a rear room and she in a front room, separated from her, and he was very much dissatisfied about it because he wanted to be near her, and that he said if he was to be separated from her in the house to that extent he might as well go to New York, and that she got to crying over it loudly, and her father heard it, and she supposed that that was what he referred to.

Q. Did he assent or dissent from it?

A. He didn't say whether that was so or not.

Q. Now, I want you to state any personal contact that there was between Prof. Kelsey and your son?

A. Just about the time that I had said what I have a moment ago stated to Mary, that she ought, I thought, now to pass on the matter and take her stand about it, the defendant said to Prof. Kelsey that it was not true, no violence, but very earnest and emphatic and very indignant, asking him to state the charge, asking him for some statement of that kind, and the Professor moved his
225 hands up and around and said, "Oh, oh," as though he thought it didn't amount to much, and the defendant reached out and put his two hands on Prof. Kelsey's wrists and said, "Now you must stand still and listen to what is being said; you cannot dispose of it in this way," or something of that sort, and in a moment he took his hands off and stepped back, and that was all of it; my son did nothing at all except what I have stated; he put his hands on his wrists and said, "You must keep still," that he could not get rid of it in that way; as he took hold of his hands he meant for him to stop throwing his hands about; in a few moments afterwards the defendant walked out and I walked out, and Prof. Kelsey went out of the house; he did not say whether that was so or not.

In regard to the interview with the plaintiff and defendant in June, 1890; I had gone to bed; it was the latter part of May or June, I don't remember the dates, because I was making no records, but it was about that time; the defendant came into my room one night, probably 9 o'clock or half past 9; I had gone to bed; I think he lighted the gas, or the hall gas was shining into the room; there was some little light in the room; and his condition was one of anxiety and worry; in a few moments the plaintiff came into my

room and sat down on the foot of the bed and said substantially, speaking to me, did I know why the defendant would speak unkindly to her; the defendant spoke up at that point and said, "Now, tell father what you refer to;" and he says, "We were talking upstairs, and you said to me that you had no respect for me when you married me and had very little since, and I replied in a strong, protesting and indignant way and came out of the room;" I don't know whether he came out the moment that was said, but
226 in a few moments that he came out of the room and came down to my room; I then said to Mary, "Did you make that statement?" and she says, "I did;" "Well," I said, "Mary, you ought not to have done it, and that would necessarily make trouble," and talked to her quite a while on that line; I got them as quiet as I could and they went out of the room and went upstairs.

I did have a conversation with Mrs. Atherton in regard to having a separate establishment for herself and the defendant; I said to her one day, I don't remember when it was, whether it was in 1890—it was after they had been married at least a year—something came up about the house and home, that if it would make her more satisfied and contented, or if she and her husband could live without these interruptions to their happy married life, that I would give them the house that we were then occupying and that myself and wife would get another place, and that I had told my wife before to make that statement to her; she replied that she did not want another house; on another occasion, when she returned in the latter part of September, 1891, I met her in Cincinnati; I was in Cincinnati on my way from New York; I stopped over there from one morning until the next to rest; my son telegraphed me that he would be in Cincinnati that evening; that was Friday; before noon I got another dispatch saying, "If you will wait until tomorrow and bring Mary home I will not come up;" so I waited until Saturday and took her home; coming home on the train I told the plaintiff that during the week or more before I had looked with the defendant at different places in the suburbs of Louisville, and that we had come down to a choice between three or four places, and we were waiting for her to come home to decide; she made no reply.

227 I did have an interview with the plaintiff and defendant in the latter part of May or first of June, 1891; if it will save time I will say that I listened to the testimony of the defendant on that point and I will only state that I had the interview in the room stated by him, that is, his mother's room, she being absent from home; the interview was in a plain, simple, ordinary tone of voice; not a rough word spoken during the interview, not rough in manner or rough in form; he told both of us what he had said about going to Chicago to stay a while quietly, and I think he also explained what he had said to his wife about taking the baby; I said what he related yesterday as a witness here, speaking to the plaintiff, calling her by name, that I was afraid that there was a radical difference in their views of life, in their views of the duties and responsibilities of life, and that if there was I was afraid it would make more or less trouble; that her husband was industrious and

loved to work, thought he ought to work to make a living for his family and do his part in the community where he lived as a man, and she I feared, thought there was no duty or responsibility resting upon her as a wife; then there was some conversation afterward about the child; something said about the custody of the child in the event that they could not live together, and she asked me if I knew what was the law on that subject; I said, "My opinion is that the law will not give the child to the one that is in the wrong," and that is the reply I made and the only one.

Q. Did you hear Mrs. Mary Atherton's testimony in this case in regard to this interview in which she said that you said, "We will take the baby away from you whenever we choose," and so forth?

A. Nothing of that kind. Nothing of that order. No rough or angry talk or threata or anything of that kind about it.

228 I was at home on the 3d of October, 1891, the day Mrs. Atherton left the house; I was not a witness to any interview between the plaintiff and defendant that day at all; I went from the house after breakfast and came back about 12 o'clock; my son telephoned for me; I came into the house and he was sitting in the parlor and he asked me to go upstairs and talk to Mary, and I went upstairs into her quarters on the third floor and found that she was gone; I was the first one that discovered that she was gone; I have not seen her to speak with her since I was present at a conference that was had in the city of Louisville at the office of Humphrey & Davie the week afterward; Judge Humphrey was there, his partner Mr. Davie, and for a part of the time I was there; Messrs. Humphrey and Davie were acting for the defendant, Mr. C. D. Adams, of Utica, Mr. McDermott, of Louisville, a Mr. Goodenow, a cousin, I think, of the plaintiff, and a lawyer from St. Paul or Minneapolis, representing the plaintiff; as a preliminary to these negotiations, my recollection is this, and it is very distinct, without pretending to quote the words; some one, I think Mr. Adams, said to Judge Humphrey, "What have you to say?" Judge Humphrey replied, "I think," the first thing is, "will Mrs. Atherton return to her home;" Judge Humphrey then related the message which he had given to Mr. McDermott, her counsel; Judge Humphrey then said that he had said to Mr. McDermott, her counsel, in conveying the message from the defendant to Judge Humphrey, requesting the plaintiff to return to her home; Mr. McDermott replied at once that he had received that message from Judge Humphrey and delivered the message to the plaintiff; there was then some other talk; after Mr. McDermott made this statement there was some talk, by Mr. Adams mostly on one side, and

229 Judge Humphrey on the other; I think Mr. Adams suggested, "What about a separate establishment?" Judge Humphrey didn't think that was practicable, a separate establishment for her to remain in Louisville and keep the child there in Louisville; Judge Humphrey said he did not think that would be satisfactory; then Mr. Adams asked, "What about making a settlement on her, then, looking to the question of her return?" Judge Humphrey replied that he did not think that would be satisfactory,

or that the husband would feel like doing that to get his wife to return; Mr. Adams then said, "There is no use in discussing this question of return any farther, because Mrs. Atherton will not return, and we may as well take up the matter of arranging for a separation;" as another preliminary to the negotiation, it was proposed or suggested by Judge Humphrey that he wanted it understood between the counsel that pending the negotiation, until it was determined whether an agreement was reached, that it would be understood that the child would not be removed out of Kentucky, or beyond the jurisdiction of the courts there, and the lawyers on Mrs. Atherton's side said that that was understood; the agreement was signed on Saturday, about 5 or 6 o'clock in the evening, I think—just the Saturday two weeks from the time that she reached Louisville; she was at the house a week, and it was a week from the time she left the house on the 3d of October; it was signed on the 10th of October.

Q. Now, about the Chicago matter, I believe I will ask you one question, if you wish to say anything?

A. Oh, no, no, I don't.

The COURT: Don't spend any time on that.

230 In the interview of 1889 of which I have spoken when I went up into my son's room, I did not hear him say, "I hope that that which is within you will die"—nothing at all like that; nothing occurred except what I have said, and he made no reply except that he would probably go to bed; he made no reply, and I did not see the plaintiff, although the door was open.

Cross-examination by Mr. MILLS:

My recollection of the interview that occurred in March, 1890, is that it commenced about nine or half past nine, and I should say it lasted an hour, maybe an hour and a half; it was probably something after ten o'clock when it was over; my son was not in anger then—not in the slightest; he spoke feelingly and earnestly, but gently and kindly—perfectly so; he was that way from the first to the last.

Q. He probably said nothing that was calculated to wound the plaintiff in any way?

A. I recall not a word nor a syllable nor a gesture.

Q. And I suppose he said nothing that did wound her at all?

A. Why, she knows better about that than I do.

Q. No; I want to see what you think about it?

A. I don't think he said anything that should have wounded her; he was appealing to her with me.

During the interview where the four of us were present she was not in tears; my son and I went down to our business place right from that interview; afterwards he was called, and I went up in his stead at his request; I went in and found Mary sitting on the bed crying very freely; I cannot say very definitely how long this was after we four had been in the room together, we were gone

about half an hour but cannot locate it with any definite-
231 ness; we had gone to the office and I had come back again;
I do not know how long she had been crying; she was not crying when I left her at the first interview, and she was crying when I saw her at that interview; she did not tell me what she was crying about; I sat down by her side on the bed and put my arms around her and kissed her; I had no idea what made her cry; if you want my opinion, I will give it, but not with my knowledge, except what I have stated that she said when I asked her what was the matter; I do not think that it was anything that occurred in the interview that made her cry; there was nothing in the interview to make her cry; not a word or a syllable; I didn't know of anything after I saw her at the end of that interview until I saw her at the beginning of the next interview; after talking to her a while she dried her tears; she seemed to get over her crying, and said that it would all drop, so far as she was concerned and that she would say no more about it and be cheerful; she wanted me to talk to my son about a certain point; from there I went downstairs, and my recollection is that before lunch she sent for me to come back upstairs, and she had gone into the front connecting room, lying on the bed, and asked me if it was agreeable to me for her sister to remain, and I told her it was, entirely; after that interview I went downstairs and my son came in; I met him then; he came into the house; I just said to him, "Come, go upstairs with me to your wife," that she was all cleared up, that I had a talk with her and she is over this trouble; he went right up with me, I walked with him, and then—I have described the talk; then we all four of us had our dinner together; all was quiet at the table and cheerful as though nothing had ever happened; after lunch my son and I
went back to our business place; there was not any call or
232 anything that occurred between that and our return to supper;
we came home to supper; within a minute or two of the time we came into the house the supper bell rang; upon that summons I expected the ladies would appear; Miss Ethel did; the plaintiff did not; I think I asked for Mary; the question was asked, I think I asked it; Ethel said that Mary was sick, and did not want any supper; I made no reply to that, nor did my son; this was said just as we were going in to the table; we had our supper, and from the supper table and the dining-room my son and I went upstairs; Miss Kelsey had gone before; as soon as we got through supper we got up from the table, in a few minutes after Miss Kelsey left, and walked upstairs into the second hall, and I went into my room, and just as I passed in the door, got inside, and my son was in the act of passing in, I heard the cry or scream from the room above; I have not pretended to relate all the details of the conversation that I had that night; I have given everything that I stated that I thought would answer fully and accurately the questions; my son asked me to go upstairs, and I went, leaving him in my room; I stayed there maybe ten minutes, when I went down to get the tablet of morphine, and went back; Ethel was upstairs in the room; I got the tablet of morphine and I took it back up there to the room where the plaintiff

was lying on the bed, crying and screaming; I think I saw my son while I was after that tablet of morphine; I told him that she was crying and in a very excited and worked-up condition, and that I had come down to get a quarter-grain tablet of morphine for her; when I told him that he was in my room; I got the morphine out of my room and took it upstairs; when I took the morphine and left my room I left my son in my room; I have given about all the
233 talk that occurred with her when I got the morphine, the substance of it; the morphine was not given because she would not take it; when Ethel first came downstairs she spoke to the defendant and asked him if he would come up and try to quiet Mary, who was crying; that was when he asked me to go up and I went; the morphine was not given nor taken, and I went back to my room because I could do nothing; I told my son that I could not make any impression upon her or do anything to quiet her; I do not remember now what he said; I presume he said something; he probably said he regretted it, or said he was surprised.

Q. Some casual remark was made?

A. No, I didn't say a casual remark; he replied, I said, but I don't remember every word said; he expressed surprise about it or regret.

The next thing that attracted my attention was this: In a few minutes, I don't remember whether it was five or six minutes, but in a little while, probably ten minutes, Miss Kelsey came back to the same room and said to the defendant, "Mary says if you will come upstairs she will cease crying."

The COURT: I think we have been over that pretty fully.

He got up and went immediately; he said, "I will go if I can do any good;" then he went right out.

At the time when my son seized Prof. Kelsey by the wrists I did not say anything; I did not speak to my son in any way, because he didn't have him by the wrists more than a minute; he took him by the wrists and stopped his hand waving and took his hands off.

Q. That was a gentle movement or action?

A. It was just the movement I have described; he took hold of his wrists to quiet his arms.

234 Q. Did you think then that the defendant was mad?

A. He was mad, wounded, indignant and excited.

Q. You think he was excited and mad?

A. He wasn't mad at his wife; he was mad at Kelsey.

Mrs. MARIA B. ATHERTON, sworn for the defendant and examined by Mr. Humphrey, testifies as follows:

I am the mother of Peter Lee Atherton and the wife of John M. Atherton, and I live in Louisville, Ky.; I will endeavor to state briefly in regard to my opening a letter in the spring of 1889 that was directed to the plaintiff; I did it accidentally; I was confined to my bed at the time by an attack to which I was at that time subject, and in a dark room, when the morning mail was brought in by a house girl who was in the habit of delivering the letters around

the house, and who could read writing; she said, handing them to me, "Here is one letter for Mrs. Peter Lee and several for you;" I said, "Please place Mrs. Atherton's letters in the vase where I have been putting letters awaiting her return from Pass Christian;" she had been due there for nearly a week, and each day there had been a letter received, which I had consigned to that place for safe keeping; I said, "Put her letters there and bring me mine;" after she left, anxious to see whom the letters were from, I had a little light thrown into my room and I opened one of the letters handed to me as mine; I opened it, folded as it was, but I did not entirely open it, and the first line I read was not at the beginning of the letter; I read two or three sentences, sufficient to make we wonder as to the cause of such a letter being written to me, and I read still a little farther to, if possible, ascertain what
235 the letter meant, what these ambiguous sentences which I could not understand meant; I read on, and then feeling sure that the letter was not intended for me I turned to the address and saw for the first time that I had made a mistake and opened a letter not intended for me; I did not give that letter to the plaintiff; I spoke to my husband about it; consulted with him on the subject as to whether I should; I never referred to that letter, nor was it ever referred to in my presence and in the presence of the plaintiff; the first talk that I ever had with the plaintiff in regard to any unhappiness in her married life occurred when I was in Cincinnati under the care of a physician there in June, 1891; I had been there several days, when she passed through going back to Clinton for the summer of 1891; she spent several days with me, three or four, and during that time we had several conversations, she for the first time telling me all the conditions and feelings of estrangement, and of the few times which she specially designated as times when they had, not disputes, she did not call them that, but when she and he had differed so widely in their views and feelings that they were estranged from each other; prior to that time I recollect when the plaintiff came to the house on her way from the South to her father's residence; it was in the latter part of March or the first of April; at that time we had a conversation; she spent a few hours at our house on her way from the South to Clinton on the day that her father died; they were detained there by missing a connection, and just before they took the train she came to me to say good-bye, and I said to her, "Mary, dear, prepare yourself for the worst, for I fear from our last advices that your father will not be living when you reach Clinton, or will be dying; it will be but very little comfort to you to find him dying when you reach
236 there; she replied, "Yes, if my father must die I would much rather, and hope I shall, reach there even a short time before his death, even a time sufficient for me to tell him how happy I have been with Peter Lee this winter, and how good and kind he had been to me, especially during our stay in the South; I have made my father—given him pain and worried him in the past by telling him that I was not happy, but now I want him to live long enough for me to reach him and tell him before he dies the truth,

for I believe it will comfort him;" I did not ask her what she referred to in the matter of unhappiness; we were just ready to part; the plaintiff and I have always maintained towards each other pleasant relations, certainly from a time previous to the birth of her child up to a year ago last February; previous to this December I speak of, or perhaps it was in November—it was only a month or two, or a few weeks before the birth of the child—she made a visit to me at Saratoga; previous to that our relations had been certainly friendly and cordial; we never had any differences or unkind expressions; I had an interview with the plaintiff on the 3d of October, the day she left the house; that morning I was lying alone in my room, and was startled by the plaintiff coming into the room hurriedly, crying very hard, and saying to me that Peter Lee was going to take the baby away from her, that he was going away, and was going to take the baby; I said to her, "Why did he say so? tell me, Mary, what has happened that would make him make such a threat as that, or say so;" before she could answer me my son entered the room; I said immediately to him, "You must not take the baby away, or you ought not to take the baby away," and he replied, "Mother, you should wait until you know the facts in the case before you blame me or make an appeal for Mary;"

237 he said, "You ought to know what she said to me upstairs that provoked me or caused me to say I would take the baby away;" he then went on and told me that they had had a conversation upstairs, resulting finally in her saying to him, "You need not and must not come into my room—you must go where you are in the habit of going," and that he said to her, "What do you mean by that? do you mean that I am in the habit of going to improper places," and that she replied to him, "You know very well what I mean," and then he turned to me and says, "Mother, this is not the first time that she has accused me of going with improper women, and now she must prove it;" I then said to her, "I must take the baby and go away, as no woman who could make such foul accusations against her husband is fit to have the care of a little child," and then I turned to her and said, "Mary, did you say what Peter Lee has stated that you said upstairs," and she says, "Yes, I did;" I said, "Do you mean it, can you believe it?" she said, "No, I do not mean it, and I would not let any one else say so;" she then started toward him and put her arms around his neck; I was still lying on the lounge; I did not hear anything she said to him; I saw him disengage her arms from his shoulders and say to her, "No, you cannot make it up in this way; I don't want you to touch me;" my son left the room at once, and she turned and threw herself—it was only a step or two—they were standing and I was lying on the couch, and when he turned and left the room, which he did as soon as he detached her arms, she turned and threw herself on the lounge on me and I put my arms around her; I did not at that interview say to the plaintiff that I, too, had been accused of infidelity; my son went out first; the plaintiff remained a

238 while; she remained with me, so far as I can remember, about half an hour, when I was trying all the while to quiet

her by telling her that Peter Lee would not take the child away, that he could not do it and would not do it, and trying to comfort her and quiet her, for she was in a great state of agitation; I did not again refer to the conversation which she had disclaimed—not disclaimed, but retracted; she finally left my room and went upstairs; I followed her upstairs and had another conversation with her over the sleeping baby; it was to the same effect, that he would not take the child, that he ought not to have said it, but that he was under the immediate provocation of what she had said; then I went back to my room; in a short time the baby awoke and she followed me to my room with the little child in her arms; she sat down by my lounge and after talking for half an hour again on the same subject she asked me to go to the back porch with her again, and I said I was not able; she walked out of the room with the child and I never saw her there again.

Q. Did you see her again?

A. Yes, sir; after lunch I got my carriage and drove to Mrs. Belknap's where I had learned that she was; I said to her as soon as we met, "Mary, I have come to take you home; won't you come with me? I want you to come, and I am authorized by your husband to ask you to come back, with every assurance that the child will not be molested, and I pledge you my personal word of honor that I will not allow the child to be taken from you; I beg you to return with me, and give you their pledged word and mine that the child will not be disturbed."

Q. Did you see her again on Monday?

A. I saw her again on Monday morning; just then on
239 Saturday her lawyer came, and she said to me, "Will you wait until I have seen Mr. McDermott, and then I will tell you if I will return with you."

Q. Had she declined to return prior to the coming of the lawyer?

A. She kept saying, "Mother Atherton, I believe you, I trust you, but I believe Peter Lee will take my child if I return; Mr. McDermott has come and I wish you would wait until I see him;" says I, "Mary, I will wait," she went into another room and had an interview with Mr. McDermott and says, "I cannot return with you and will not;" she asked me on Saturday to come again and see her, and I was glad to do so and I went on Monday; there was nothing important occurred at that interview that I remember of; I remained only a short time; I do not recollect anything of any importance except that she told me then that her aunt would be there that evening, and as soon as she was located she would let me know and hoped I would come to see her.

I had an interview with the plaintiff in the early part of January, 1892, at Cincinnati; in the very first private interview I had with her I said to her, "I have come with a definite purpose—when I came here at least I came with a definite purpose in my mind that when I met you I should ask you some questions which I have not written to you in regard to certain statements which I very recently heard that you had made in Louisville; I heard them from parties claiming to be friends of yours;" I says, "There were verbal state-

ments and I heard them stated as having been contained in letters which you had written to Louisville;" I then told her what those charges were; the charges were made against his character, charging him with infidelity and charging him with cruelty and violence;

I said to her, "I have disbelieved all these charges; I have
240 denied them, not believing that you have ever made them;"

I gave her in detail the charges made, or so far as I knew the names of those who had given me this information; in some cases I had received it at second hand and spoke of it; I told that I had, and wished to know from her if she had or if she had not made those charges; she positively denied making any and all of them, to me; I went to Buffalo in the latter part of April, 1892; the child came to me in the early part of January, 1892, and I kept it until the latter part of April, 1892, when I brought it to Buffalo and returned it to the plaintiff.

The following letter, dated Buffalo, N. Y., April 29th, 1892, was read in evidence:

"BUFFALO, N. Y., *April 29th*, 1893.

"MY DEAR MOTHER A.: I was getting ready to come and see you, as I wanted very much to do, but Valeria begged so tearfully, 'Mamma musn't go and leave her Birdie,' that I cannot leave her. She is looking well, and is bright and happy. I am sure she knows me, and oh, the joy of having her in my arms again I cannot begin to tell you.

"I wanted to thank you face to face for your care of her and for sending me such constant news of her. I know from bitter experience how hard it is to say good-bye to her; so as you have said it once, I won't send her to you again; I am sorry to hear from the papers of your husband's illness, and I hope the trip across the sea will help him. I am sorry for your anxiety.

"Lottie tells me you are returning at once. I am going at once to Lockport and shall be there during May at least with Ethel.

"You have not said much to me of yourself for some
241 time. How are you? Hoping that you have a safe journey and a cheerful one, I am as ever,

"MARY.

"I shall try to write to you at least twice every week, and don't be anxious if you do not hear—for when I do not write, believe that 'no news is good news.'

"Thanking you again, MARY."

"I tried to go to the bath-room and Valeria cried so I had to take her with me."

A short time after the child came to me she had a deep cold. There was a prevalence of grippe which was a perfect epidemic, and Dr. Monroe said she had an attack of influenza. She was never sick enough to stop play at any time.

Cross-examination by Mr. MILLS:

The child stayed with me four months; the influenza I would call a very mild attack, for she never stopped playing; I have stated every word that I have any recollection of in the interview between my son and Mrs. Mary Atherton in my room on the 3d of October, 1891, except the repeated statements or conversation with the plaintiff after my son left the room; the occurrence made an impression on my mind; the occurrence is very vividly and clearly impressed upon my recollection, and what was said by the different actors is clearly in my mind; I thought at the time I heard all they said; when the plaintiff went up to my son and put her arms around his neck she was crying.

Q. And he gently took her arms down off his shoulders or neck, I suppose?

242 A. Yes, sir; he just took her arms or her wrists firmly but very gently.

Q. He was not excited?

A. Yes, sir; he was excited.

Q. Oh, he was! Did you ever see him in his conduct or treatment toward her when he was not gentle?

A. I have seen him talking to her in very positive and emphatic terms, in which was betrayed, in the tones and in the words, an amount of feeling, intense sensitiveness, intense feeling and sometimes indignation; I never saw him when he was talking to her, or his indeportment toward her, when he was in a passion, nor when he was enraged, at any time in their married life; I never saw him in his deportment toward her when I thought he was mad.

I recognize the letter that you show me; this letter is in my handwriting; there is an erasure and a word written over it that I did not write; there are also quotations in the letter; I wrote the body of it; I think it is all mine except the one word; I think that the word "unreasonable" after the word "been" was not written by me, that is, I did not write the *the* "un" part of it, that I wrote the word "reasonable;" letter in question was marked Exhibit No. 14 and the word in question marked A; I wrote all of that letter except the one syllable; I sent the letter to Mrs. Atherton; I would say it was written three or four weeks before she returned to Louisville in the fall of 1891 and sent to Clinton; I do not remember whether I wrote her another letter after this before her return; I do not think I did; I think that is the last letter, for I remember to have expected her the next week, or expected her in a few days; the letter was written in Cincinnati, and I had expected her

243 to join me there and return to Kentucky, and I don't believe I wrote a letter afterwards, but I am not perfectly sure.

Q. Then you say this letter should read in the part to which you have drawn attention, "He has been reasonable, but now you have been away so long and have not tried to shorten your visits"?

A. That is not intended to be in the same sentence; I did not so intend it; read what comes before if you are going to read what comes afterwards.

Q. Do you know what you referred to when you wrote that sentence, "He has been reasonable"?

A. Yes, sir; I referred to my son, and I said if you would read the sentence before that you would understand this sentence.

Q. (Reading:) "You need never fear now P. L.'s bursts of passion. They will never occur again." Did you write that?

A. Yes, sir; but that is in quotation marks; that expression was in reference to what she had written me; after examining the letter carefully I should say that in that sentence I had no reference to any conduct of my son that I knew of.

Q. (Reading:) "It will then have been three weeks since he wrote about your coming, and while I know and do not forget all you have borne, you must remember you have had your own and his little girl." Did you write that?

A. Yes, sir; I did; by "he" and "his" I referred to my son; I referred in that connection, in that sentence, to her own feelings as expressed to me—her own regrets, the separation from her husband; during the summer he, it seemed, had written several letters that he lamented that he could not come to Clinton, and I also
244 referred to what she had stated to me in some letters in regard to her dissatisfaction in many ways in which he had failed to please her; I did not refer to any conduct on his part that I knew anything about, and I did not mean that it should be regarded as referring to that.

Q. Have you got the letters from the plaintiff to you where she speaks about bursts of passion?

A. Yes, sir; I received some.

Q. No, no; have you them now?

A. No, sir; I don't know that I have.

Q. You have now given Mrs. Atherton all the explanation of these sentences in this letter to which I have drawn your attention, that you desire to give?

A. No, sir; I have not.

Q. What other explanation of that sentence, "I know and do not forget all you have borne," do you want to give?

A. Simply to make my meaning a little clearer in regard to her writing me during that summer several times that she was disappointed in many respects in her married life; complaining of her husband's health, and that he did not come to Clinton as she thought he ought to have done; among other things that she stated to me that she had written to him sometimes without his replying to them, which at that time I did not understand.

The letter referred to was then read in evidence.

"My Dearest Mary: I have felt heart-troubled since I wrote you Monday, and must send you a few lines, by way of expression for myself and persuadings for you. First, I want you to know that I wrote then, as I have always done, upon my own responsibility. Between you (whom I love as my own daughter) and myself there is the same confidence, frankness and affection, just as

between me and my son, whom I love better than my life,
245 there is truth and love. I have not written for or of one of you to the other to play a part, to interfere, or to be what is usually termed a 'go-between.' Yours and my correspondence has been as sacred to me as I have told you I wanted mine sho'd be with you, and I have written and advised you wholly and solely from my love for you, as well as love for him, from as earnest a wish to promote yours, as well as his, happiness. When we parted last June you said, 'Advise me when at any time you see I had better do some certain way, or what I had best do.' I asked if I must really take that privilege, and you said yes, and so I have. And I believe you have always understood me. Now, as P. L. wrote you two weeks ago about coming, and as it is perfectly safe for Dolly to come to Ky., if I were you I would start from Clinton and come home in the next day or two. I would give up, for the present, the visit to Ethel and come back to see her later, when P. L. goes East, or at Christmas. And I hope she will come soon to see us. But you have been with them all a long while, since April (excepting the month at Louisville), and they have had the precious baby; and her father now has been at home alone for two weeks and has asked you to come and bring her. It is a serious matter with him, and a crisis, perhaps, in your lives, and I would make a sacrifice even to do as he has asked you, and what in itself is reasonable now. He has been unreasonable, but *now*, you have been away so long and he has not tried to shorten your visit before, and I know he was very full of your coming *now*.

"If you delay and disappoint him now, even for a week, I shall be very sorry, more sorry than I can tell you. He wanted you to see the country place with him. He wants you to come without reference to the satellites or anything else, and I would try
246 to please him now. It would wipe out all the past, now, for you to go right home, and I believe if Ethel knew all she would tell you to go. You need never fear now P. L.'s 'bursts of passion;' they never will recur again, and you will see I am right. But you can heal the breach and walk right into your old place in his strong loving heart and arms if you will not wait for anything or anybody now, but go at once. It will then have been three weeks since he wrote about your coming. And while I know and do not forget all you have borne, you must remember you have had yours and his little girl, and he has been alone. I never encouraged him to go to Clinton, as I never encouraged him to come to me, because he was improving at Chicago and I feared a change might hurt him, as it did, when he came home. All has been done for the best so far now; if you can only come all will be well. We wives, the world over, and in all times, must and ought to grant our husbands' requests, when it is reasonable, and he asked you two weeks ago to come.

"He will never know I wrote you this and I think he would not wish me to. But you gave me the privilege to advise you and if I have gone too far and transcended that privilege, I will never offend again, but I must love you and live for you and P. L. always.

"In truth and love, MOTHER A.

"In all this, much as I long to see you both, I have not thought of myself once."

In regard to the letter that came to me which I opened, after reading part of it, as I have previously stated, I was in bed and it lay beside me for a little while, and later on, after a few hours I
247 told my husband of what had occurred, when he returned home at noon; I kept the letter; my son and wife were then in the South; they came home in two or three days; I showed the letter to my husband; it is now in the possession of the lawyers for my son.

The witness continues: I never showed this letter to my son's wife nor alluded to it to her in the most indirect or remote way.

CHARLES D. ADAMS, sworn for the defendant and examined by Mr. Beardsley, testifies as follows:

I live in Utica; I am a member of the bar; "Exhibit No. 7," already identified, is shown me; I identify that as my signature as subscribing witness; I saw the various parties sign that paper, or it was acknowledged to me; I think I saw all of them sign it; that is my recollection.

Mr. BEARDSLEY: This instrument is signed by Henry P. Goodenow, Mary G. Atherton and Peter Lee Atherton, on the 10th day of October, 1891, in the presence of Edward J. McDermott and Charles D. Adams.

Q. Do you know where Mr. McDermott resides?
A. Mr. McDermott resides in Louisville, Ky.
Q. Did you see him sign it?
A. I think I did.

Paper offered and received in evidence, and appears in "Exhibit 15," the Kentucky judgement.

THOMAS L. BARRETT, sworn for the defendant and examined by Mr. Humphrey, testified as follows:

I live in the city of Louisville and have for many years past;
248 I am well acquainted with Mr. and Mrs. John Atherton and Mr. Peter Lee Atherton; I was the godfather of this child, Mary Valeria Atherton, the child of Mary G. Atherton and Peter Lee Atherton; I know the reputation of Mr. Peter Lee Atherton and Mr. and Mrs. John M. Atherton in the community where they reside; I believe them fit and suitable for the keeping of the child.

Cross-examination by Mr. MILLS:

I make no distinction in the fitness of these three persons in their fitness to take care of the child; I made the acquaintance of the plaintiff shortly after her marriage, after her coming to Louisville, at the house of Mr. John M. Atherton; I saw her there at the house; when the child was born it was baptized in the Episcopal church, of which Mrs. Atherton is a member; she selected me for the godfather; I understood at the time of the baptism that I was her

selection; I cannot swear as to who else stood sponsor for the child beside myself.

BASIL W. DUKE, sworn for the defendant and examined by Mr. Humphrey, testifies as follows:

I reside in the city of Louisville, and have for many years past; I know Mr. Peter Lee Atherton, John M. Atherton and Mrs. John M. Atherton; I have known Mr. Atherton for more than thirty years, Mrs. Atherton for perhaps twenty or more, and Mr. Peter Lee Atherton for perhaps twenty years; I know their character in the community in which they reside.

Q. From your personal knowledge of them, and from their character in the community in which they reside, I will ask you to state to the court as to whether they are fit and suitable persons to have the care and custody of the infant child of Peter Lee Atherton.

249 A. I think so, unquestionably.

(Cross-examination waived.)

CHARLES D. JACOB, sworn for the defendant and examined by Mr. Humphrey, testifies as follows:

I reside in the city of Louisville, and am now president of the Mutual Life Insurance Co.; I have lived there all my life; I know Mr. and Mrs. John M. Atherton and Mr. Peter Lee Atherton; I have known Mr. Atherton for twenty years, Mr. Peter Lee Atherton intimately since 1886; Mrs. Atherton I have only known about a year; I know their character in the community in which they live; they are eminently respectable people, and would be considered by every one as proper custodians for a child.

Cross-examination by Mr. MILLS:

I live on the same street, and pass their house once or twice or three times, six days in the week; I only know that they have brought up one child, the defendant.

At this point Exhibit No. 7 was received and read in evidence by defendant's counsel. It is the same agreement which is dated October 10, 1891, signed by Peter Lee Atherton, Mary G. Atherton and H. P. Goodenow, and witnessed by Chas. D. Adams and E. J. McDermott, and is contained in Defendant's Exhibit No. 15, which is the record of the suit in the Jefferson circuit court, law and equity division, wherein Peter Lee Atherton was plaintiff and Mary G. Atherton was defendant, and is marked in such record as Exhibit A.

250 FRANK MILLER, sworn for the defendant and examined by Mr. Humphrey, testifies as follows:

I am the book-keeper of the J. M. Atherton Co.; being asked what remittances were made to Mrs. Mary G. Atherton on account of and by the direction of Peter Lee Atherton, after the 3d of October, 1891, I will say that I gave Mrs. Atherton on the 14th of October $250; November 2, 1891, $180; that was remitted; Decem-

ber 2, $125; January 9, 1892, $125; February 4, 1892, $125; March 1, 1892, $125; April 2, 1892, $125; then the amount changes; May 9, $187.50; June 7, $187.50; July 2, $187.50; August 2, September 2, October 3, November 3, and December 3, all the same amount, $187.50; the one that was remitted December 3, 1892, $187.50, was returned by Mrs. Atherton.

Cross-examination by Mr. MILLS:

Q. There have been no remittances since?
A. No, sir.

ALEXANDER P. HUMPHREY, affirmed, for the defendant, testified in reference to the statutory law of the State of Kentucky on the subject of divorce, and the procedure in the courts, and also as to certain decisions; but it was agreed that in lieu of such evidence, that either party might refer to any statute of the State of Kentucky or decisions of its courts. The counsel for the defendant offered in evidence record of the divorce proceedings, and judgment in the State of Kentucky brought by the defendant against the plaintiff, which was marked "Exhibit No. 15" and read in evidence. The same is hereinafter set out.

Defendant here rested.

251 Mrs. JULIA SHELDON NEARY, recalled, and examined by Mr. Mills, testifies as follows:

I have heard the testimony which has been given since I was a witness before in this case, and I have heard the reference in the testimony of the defendant to the occasion when he said I came to his door and called him and he went to his wife's room in the night; there was such an occasion, but it was not on the Saturday night of which I spoke in my evidence; I think possibly it was about two or three weeks later, between two and three weeks later.

Q. And on the night of which you spoke when he was in his wife's room until 3 or 4 o'clock in the morning did you go to his room and call him to come to his wife?

A. I did not.

Q. Were you asked on cross-examination with reference to some cloths in the grate?

A. I was.

Q. Were there cloths there which had been left there four or five days?

A. There were not.

Cross-examination by Mr. BEARDSLEY:

Q. How many times did you go to the room of the defendant to call him or speak to him, or knock at his door?

A. I went there once, anyway, and possibly twice, but I don't remember but once.

Q. Couldn't it possibly be three times?

A. No, not as I know of; I don't remember.

Q. Couldn't it possibly be three times?

A. I don't know.

252 PETER LEE ATHERTON, recalled for further cross-examination by Mr. Mills, testifies:

I remember an occasion when I received a letter from Prof. Kelsey at Cresson; upon receiving it I tore it up and threw it down; this was in July, 1890; I did not open it; I do not remember whether I tore the letter up in my wife's presence or not; I told her that I didn't open the letter, but that I destroyed it without opening it; I do not remember whether it was in her presence or not; I knew whom it was from because I recognized the writing; I do not know what eventually became of it; my best recollection is that it was torn up and thrown in some receptacle; it was torn in two; I don't know that it was torn into bits; I did not send it back to Prof. Kelsey; I was not at the time angry in the slightest; I did not tear it up in anger.

Redirect examination by Mr. HUMPHREY:

After my interview with Prof. Kelsey in Louisville, Mrs. Atherton said something to me about having written to her father to write to me in regard to that occurrence several times; she said that she had written her father that I felt very much aggrieved and injured at what he said to me when he was in Louisville, and that I had said to her that I would never go to Clinton, or that I could not go to Clinton while matters stood as they did between him and myself; she told me on one occasion, I remember very distinctly, because I was waiting to hear the result of the letters, that she was sorry to say that there seemed to be no change of feeling toward me at Clinton; this nurse, Mrs. Neary, came to my room a number of times at night, when my wife was sick, half a dozen times; I
253 kept my dressing-gown and slippers always ready at my bed, and went into Mrs. Atherton's room frequently at night.

Recross-examination by Mr. MILLS:

Q. Your wife had said before you received this letter that she had been writing to your father asking him to write you a letter?

A. Not immediately before the receipt of the letter; it was in April or May; somewhere along there—two or three times during the month of April and May; after that there was nothing more said about it; I think this letter must have come to Cresson about the 10th of July.

Mrs. MARY G. ATHERTON, the plaintiff, recalled, and examined by Mr. Mills, testifies as follows:

Q. Since you were a witness yesterday you have heard the testimony or most of it that has been given in this case?

A. Yes, sir; I have been present almost all the time.

I have heard the testimony of Peter Lee Atherton; I heard his statement just now with reference to a letter that came to him from my father; there was such a letter, and I was present when he tore it in two; about that time I spoke to him with reference to advices

I had that my father was going to write or had written him a letter; I read him a portion of my mother's letter which referred to this one; it was on the same occasion when he tore up the letter; the letter from my mother came, I think, in the same mail, or in the mail before; my mother wrote me that my father had
254 written an apologetic letter to my husband to make it possible for him to come to Clinton for my sister's wedding; he did not read my father's letter, but tore it in two and threw it on the floor; before that time I had written to my father about the subject of writing to my husband, but I did not say to my husband that I was sorry to say that there was no change in the feeling at Clinton, or anything of that kind; I did not communicate to him that my father would not write him any letter, or anything like that; I have heard here some reference to the occasion when this agreement was signed at the Galt house in Louisville, and to Mr. McDermott.

Q. Prior to the time of the signing or making of that contract, did you receive from Mr. McDermott any message from your husband asking you to return or come back to the house?

A. I did not; I have never received any message from my husband.

Q. After you left the house with your child on the 3d of October, did you, at Mrs. Belknap's or at the Galt house, receive from him any message or invitation to come back?

A. No.

Q. Except as you stated on your direct examination?

A. No, sir.

I did have a talk with him that I would come back if I had certain assurances, when he first came to see me; Mrs. Atherton came to see me at the Galt house; the first talk we had was at Mrs. Belknap's; Mrs. Atherton asked me to come back; I said to her, "How can I go back and live with Peter Lee?" she said, "There is no question of your living with Peter Lee; he does not wish it; we only wish you to come back that there need be no scandal
255 in Louisville; I do not remember that I made any reply to that; that was the only conversation between me and her on the subject; this agreement which has been produced in evidence was signed at the Galt house in Louisville; I signed it there; I understood that there was some negotiation with reference to that agreement before it was signed.

Q. And on the day it was signed and just preceding it at that time, what was your condition with respect to health?

A. I was completely prostrated with crying. I was not at all well. I was exhausted with crying after what had happened in the house. I was not in a fit condition for a decision to be made.

Mr. MILLS: What was your understanding when you signed the paper as to its duration?

Mr. BEARDSLEY: I object to it as immaterial and incompetent and tending to vary a sealed agreement by parol.

The COURT: Take your exception. I will receive the evidence.

Mr. MILLS: What was your understanding as to its duration?

A. My understanding was that the contract was an experiment and was to last for a year only.

Mr. BEARDSLEY: I ask that that be stricken out.

The COURT: Denied. So far as these conversations and these incidents that have been referred to by her and then related by the defendant, where they are not stated the same, the court understands that it is not necessary to go over and contradict them.

256 Mr. Beardsley excepted to the refusal to strike out the above request.

Mr. MILLS: In giving your version upon the witness stand of these various interviews which relate to your cause of action in this case between you and your husband, did you give all or substantially all that was said and occurred?

A. Everything.

In the four-handed interview, so called, I did not strike my fist into the palm of my hand, nor did I make in any interview that demonstration; I remember the occasion in 1890 when Mr. John Atherton came up and sat by my side on the bed as he described; he asked me two questions: "Do you wish to divorce your husband?" I said, "No;" he said, "Do you love your husband and want to live in peace with him?" I said, "Yes;" that was all that occurred at that time, and he went out and went away; while I lived with my husband the term by which I called him was "Laddie;" on the occasion when the defendant had my father by the wrists I did not step up to my husband's side and put my hand in his arm; I went behind him and put my arms and hands around his arms and body; that was while he had my father by the wrists; I never told Mr. John M. Atherton that I married the defendant to go to balls and theatres and to travel and not to work; with the exception of the reference to "Chicago friends" I never said anything in terms or by implication which suggested that I thought my husband had been unfaithful to me.

Q. Did you hear the statement by the defendant and his father with reference to talking to you about having a separate house?

257 A. I heard what Mr. Atherton said.

Q. Was there a talk as he states on that subject with you?

A. No.

Q. Now, was there an occurrence when there were some plans present in the house?

A. As nearly as I can remember it was the October before I came away, and I never saw the plans, but I knew that my husband and his father had those plans of a house, elevations and so forth, and were looking at them; they never showed them to me and never asked my approval, and what they were talking I don't know; I never had them.

They never asked me to look at these plans nor consult about them; I was in the room then; I had a talk with Mrs. John M. Atherton in the city of Cincinnati at one time, when she talked with me about my having reported that my husband had been cruel and

unkind to me; she said in substance that I had told that in Louisville, in the fall of 1891; I told her that I had not told it in Louisville; that I had not opened my mouth about him while I was in Louisville; I became a communicant and member of the Episcopal Church when I was fourteen years of age, in Phillips Brooks' church in Boston, and I have been a communicant and supporter of that church ever since; I had my child baptized in the Episcopal church at Louisville in May following its birth; my husband is not a member of any church or religious body; he went to church sometimes with me, but not himself; I think Mrs. Atherton is a member of the church, and I believe Mr. J. M. Atherton is not.

Q. I show you a letter dated July 7th, 1889. Did you receive that from your husband about the time of its date?

258 A. Yes, sir; I did.

Mr. MILLS: I offer it in evidence.

The following is the letter referred to, and is Exhibit 16:

"DENVER, COLO., *July 7th*, 1889.

"MY DEAR MARY: Your letters of July 1st and 2d received, the one written the first forwarded from Manitou. I am always glad to hear from you that you are well and having a good time, and I am very glad to know that now; under ordinary circumstances the bright, pleasant parts of your letters would be very welcome and very much enjoyed. But when you have raised such a question as my letter of June 30th referred to, a fundamental question of principle on which our marriage and our future life together rests, and when you have deliberately persisted in treating that subject in such a way that it looks as if you really believed what was intimated and implied, you cannot drop such a question and smooth it over by a few pleasant words. Until this question of deception is fully and clearly understood and finally settled, it is useless to bring any other matters or topics into the correspondence.

"YOUR AFFECTIONATE HUSBAND."

Cross-examination by Mr. BEARDSLEY:

Q. Your counsel produced today a letter from you to the defendant.

A. Yes, sir; I found that letter among a lot of my own, old ones.

Q. Have you got any more of your letters which you wrote to him?

A. I don't know; I don't think I have.

259 The following letter was offered and accepted in evidence, and marked Exhibit No. 4:

"LANCASTER, MASS., *January 2d*, 1892.

"DEAR MOTHER A.: Your first letter is the kind and sympathetic answer I expected. Your telegram has a presumptory tone unlike yourself. I have not your second letter. I expected to start so as to be in Louisville Jan'y 1st, and should have done so had it not

been for Hannah's illness. Had there been anything threatening a long siege I should have come, leaving her behind. With the doctor's assurance that she would be able to travel so soon, and with all your written sympathetic agreement with me that it was most desirable Valeria should enter a strange home away from me with a companion she loved and was accustomed to—I feel justified in waiting the few days needful to accomplish that end. Justified, because the compact was between *you* and *me*, and in the spirit of mutual confidence—and *you* knew I would not delay a day longer than was needful and only delay at all because of the 'good of the child,' which you urge as our one desire. Justified also because *verbal* allowance on this point was made by the lawyers. When I had agreed to the compact as *told* me, it was presented written out by your lawyers in a quite different way. A sentence most important to my interests was omitted, and the time you were to keep Valeria was extended two weeks, to the 15th of May, an attempt to crowd me out of half a month, to which I had not agreed. My lawyers refused any such thing, and after some discussion allowed it to be written the 'first week in May,' 'my good lawyer,' Mr. Adams, as you call him, saying, 'Well, I suppose some elasticity is allowable at each end. Mrs. Atherton will not be expected to appear here at twelve o'clock Jan'y 1st, whether or no,' and the opposing counsel assented. It was not *you* who tried to prolong my child's absence from me without my consent, but the attempt shows there is a willingness to crowd me somewhere, and that from you only have I to expect said feeling. I would not have signed the paper standing Jan'y 1st and the first week in May had I not been assured it meant only to allow a little leeway for unexpected circumstances, a latitude verbally put at my discretion as in writing at yours. I intended to reach Louisville yesterday, and for personal reasons wished to do so. But in getting there before the end of the 'first week in January' I do not consider I violate any pledge. I shall see you in Louisville very soon.

"In great haste to catch the mail,

"Lovingly, MARY."

This closed the evidence.

This case contains all the evidence.

DEFENDANT'S "EXHIBIT NO. 15," KENTUCKY JUDGMENT.

STATE OF KENTUCKY, } ss:
Jefferson County, }

Pleas before the Honorable Sterling B. Toney, judge of the Jefferson circuit court, law and equity division (formerly the Louis-
261 ville law and equity court), at the court-house, in the city of Louisville, county and State aforesaid.

PETER LEE ATHERTON, Plaintiff, }
vs. } Transcript of Record.
MARY G. ATHERTON, Defendant. }

Be it remembered that heretofore, to wit, on the 28th day of December, 1892, came the plaintiff, by Humphrey & Davie, council, and filed in the office of the clerk of the court, aforesaid, the following petition, to wit:

Louisville Law and Equity Court.

PETER LEE ATHERTON, Plaintiff, }
vs. } Petition in Equity.
MARY G. ATHERTON, Defendant. }

The plaintiff, Peter Lee Atherton, says that he resides in Jefferson county, Kentucky, and has resided here continuously for more than ten years last past; and that on the 17th day of October, 1888, he and the defendant, Mary G. Atherton, were married; that from the date of the said marriage the plaintiff and defendant continued to reside in said Jefferson county; that while the plaintiff and defendant were thus residing in Jefferson county, Kentucky, in the month of October, 1891, defendant Mary G. Atherton, without fault upon the part of the plaintiff, abandoned the plaintiff; and that said abandonment has continued without interruption from that date to this, and has now existed for more than one year; that the
262 only fruit of said marriage was a daughter named Mary Valeria Atherton, born to the plaintiff and defendant January 8th, 1890.

The plaintiff further says that the defendant, Mary G. Atherton, has been absent from this State for more than four months, and is now absent therefrom; that the said defendant may be found in Clinton, State of New York, and that in said Clinton is kept the post-office which is nearest to the place where the defendant may be found.

Wherefore plaintiff prays that the court will enter a judgment divorcing him from the bonds of matrimony with the defendant, and that the court will make such orders in respect to the care, custody and education of the said child as shall seem to it fit; and plaintiff prays for all proper relief.

HUMPHREY & DAVIE,
For Plaintiffs.

Peter Lee Atherton says that the statements in the foregoing petition are true.

PETER LEE ATHERTON.

Subscribed and sworn to before me by Peter Lee Atherton this 27th day of December, 1892.

R. A. BATMAN,
N. P., J. C., Ky.

COMMONWEALTH OF KENTUCKY, }
Louisville Law and Equity Court. }

Pursuant to the affidavit contained in the within petition the non-resident defendant, Mary G. Atherton, is hereby warned and ordered to appear here within sixty days from the date hereof and answer the foregoing and within petition of plaintiff.

263 And it is further ordered that Jno. C. Walker, an attorney of this court, be and he is appointed to defend for and on behalf of said non-resident defendant, and to inform her of the nature and pendency of this action.

Witness my hand this 28th day of December, 1892.

JNO. H. WELLER, *Clk.*
JNO. G. WALKER, *D. Clk.*

And afterwards at a court held for the court aforesaid on the 6th day of February, 1893—

Came John C. Walker, attorney for non-resident defendant herein, and filed his report.

Said report is in words and figures as follows, to wit:

Louisville Law and Equity Court.

PETER LEE ATHERTON, Plaintiff, }
vs. } 5248.
MARY G. ATHERTON, Defendant. }

Having been appointed as a practicing attorney of this court to correspond with and defend for the non-resident defendant, Mary G. Atherton, in case a defense can be made for her, as soon as I was advised of my appointment so to do, I at once made a careful and accurate examination of all the papers in the case—petition, affi-

264 davit, &c.—and after making a copy thereof on this, the 5th day of January, 1893, I wrote to said defendant, Mary G. Atherton, at Clinton, in the State of New York, fully advising her of the objects and purposes of this action, stating therein a substantial copy of the petition, &c., plainly directed said letter to her at said place, paid the postage, had printed on the envelope enclosing it, "If not delivered in ten days return to Jno. C. Walker, attorney-at-law, No. 516 West Jefferson street, Louisville, Ky." Said letter has not been returned to me. I have received no answer thereto from said defendant or any one else for her, and do not know nor am I advised of any defense to make for her, and make none,

only that which the law in such cases makes for non-resident defendants that is made, and that only, as I know of none other. All of which is most respectfully reported.

JOHN C. WALKER,
App't'd Att'y for the Non-resident Def't, Mary G. Atherton.

And afterwards at a court held for the court aforesaid, on the 13th day of March, 1893, the following order was entered:

On motion of plaintiff, by counsel, ordered by the court that this case be submitted, and the court not being advised takes time.

And afterwards at a court held for the court aforesaid on the 14th day of March, 1893:

This action having come on to be heard upon the pleadings, report of attorney for the absent defendant and the evidence, and the court being advised, it is considered by the court that the
265 plaintiff, Peter Lee Atherton, has resided in Jefferson county, Ky., continuously for ten years last past, and that he and the defendant, Mary G. Atherton, were married on the 17th day of October, 1888; that from the date of said marriage the said plaintiff and defendant resided in Jefferson county, Kentucky; that while the plaintiff and defendant were thus residing in Jefferson county, Kentucky, to wit, on the month of October, 1891, the defendant, Mary G. Atherton, without fault upon the part of the plaintiff, abandoned him, and that said abandonment has continued without interruption from that time to this, and at the filing of the petition herein had existed for more than one year; that the defendant, Mary G. Atherton, had, at the filing of the petition herein, been absent from this State for more than four months; that therefore it is further considered and adjudged by the court that the plaintiff, Peter Lee Atherton, is entitled to the decree of divorce prayed for in this petition, and that the bonds of matrimony between the said plaintiff, Peter Lee Atherton, and the said defendant, Mary G. Atherton, be, and they are hereby dissolved.

It appearing to the court that in the said marriage there was born a daughter, Mary Valeria Atherton, on January 8th, 1890, and that the defendant, Mary G. Atherton, now has the said child beyond the jurisdiction of this court, without the consent of the plaintiff; and that the court cannot make an effective order in reference to the custody of said child, no order will now be made as to such custody, or as to any allowance of alimony, or in the nature thereof to the said defendant; but the court reserves the power to make such orders hereafter.

It is further considered by the court, that each party shall
266 restore to the other any property not disposed of at the commencement of this action, which he or she may have obtained directly or indirectly from or through the other during marriage, in consideration or by reason thereof.

The sum of twenty dollars is allowed John C. Walker, warning-order attorney, and the plaintiff shall pay this and all the other costs of the action to this date incurred.

The following evidence was filed of record in this case before the hearing or submission thereof, and was read upon the hearing thereof:

Plaintiff's Depositions.

Jefferson Circuit Court, Law and Equity Division.

P. L. ATHERTON, Plaintiff,
vs.
MARY G. ATHERTON, Defendant.

Interrogatories for plaintiff, to be addressed to George W. Nuchols, Mrs. Ann T. McNairy, and L. G. Crawford.

GEORGE W. NUCHOLS, a witness herein in behalf of the plaintiff, being duly sworn this 23d day of February, 1893, neither party, agent or attorney being present, deposes and says:

1. State your name, age, residence and occupation.

A. Name Geo. W. Nuchols, age 44 years, residence Cincinnati, Ohio, traveling salesman for the Sam'l Woodside Co. of Cincinnati, Ohio, in which I am interested.

267 2. State what, if any, relation you are to the plaintiff or the defendant.

A. I am an own cousin to the plaintiff's mother.

3. State whether or not you are on terms of intimacy with the plaintiff or the defendant, or the father or mother of the plaintiff.

A. I am on terms of intimacy with all of these parties.

4. State what opportunity you have had to observe the conduct of the plaintiff and defendant towards each other during the time they lived together as husband and wife. State whether, in that time, you were a visitor at any house where they resided, and how frequently and how intimately you were within that family circle.

A. In traveling for the above company I was in Louisville frequently, as often as six or eight times a year, and remained from two days to one week each time, and always made my home at the home of the plaintiff's family, where the plaintiff and defendant resided. As I never canvassed for business in the city, I spent most of my time with the family and was intimate there, as if I had been a member of the family; during many of these visits both plaintiff and defendant were at home.

5. State whether or not the plaintiff was kind, affectionate, and attentive to the defendant, and generally his conduct towards her as a husband.

A. The plaintiff was always kind, attentive and affectionate towards the defendant and provided most liberally and generously for her comfort and pleasures. Several times the defendant said to me that her husband was the most generous person she ever saw.

6. Do you know the habits of the plaintiff for sobriety, industry and integrity? If so, what are they, and how long have they been so?

268 A. Yes, sir; I have known the plaintiff intimately all his life, and he has always been sober, industrious, upright and honorable, as a boy and as a man.

7. Do you know how long it has been since the plaintiff and defendant lived together as husband and wife? If so, state how long.

A. The plaintiff and defendant ceased to live together as husband and wife in October, 1891.

8. So far as you know from your personal knowledge, was the separation between the plaintiff and defendant caused by the fault of the plaintiff?

A. It was not.

9. Were you present at the marriage of the plaintiff and defendant? If so, when did it occur?

A. I was present at said marriage. It occurred in October, 1888.

10. State anything else you may know of interest to the parties in this litigation.

A. I have stated that the plaintiff was kind and affectionate to his wife, and I know that every member of the family treated her with consideration and affection; I did not know that defendant was dissatisfied with her married life until the early part of the summer, 1891, when she expressed dissatisfaction in a talk she had with me during one of my visits; in replying to a question from me as to why she was dissatisfied, she said her husband was sick so much, but did not allude to any unkindness on his part.

By CLERK:

2. Are all the statements in the foregoing answers made from your personal knowledge? If not, which of them are made from information or belief, and what is your source of information or foundation of your belief?

A. I have answered only from my own knowledge.

269 3. Have you any interest in this action, direct or indirect? If any, what is it?

A. I have no interest whatever in this suit.

4. Have you stated all you know concerning this action? If not, state what you have omitted.

A. I have told all that I can think of as known to me in the matter.

GEO. W. NUCHOLS.

L. G. CRAWFORD, a witness herein in behalf of plaintiff, being duly sworn this 24th day of February, 1893, neither party, agent, nor attorney being present, deposes and says:

1. State your name, age, residence and occupation.

A. L. G. Crawford, age 49 years, residence Louisville, Ky., occupation clerk.

2. State what, if any, relation you are to the plaintiff, or the defendant.

A. I am an uncle by marriage to the plaintiff.

3. State whether or not you are on terms of intimacy with the plaintiff, or the defendant, or the father or mother of the plaintiff.

A. I am on terms of intimacy with the plaintiff and with his father and mother. I know the defendant, and was well acquainted with her from her marriage, until she left her husband.

3. State what opportunity you have had to observe the conduct of the plaintiff and defendant towards each other during the time they lived together as husband and wife. State whether, in that time, you were a visitor at any house where they resided, and how frequently and how intimately you were within that family circle.

270 A. I was in the company of the plaintiff and the defendant frequently after their marriage up to the time of their separation. I saw them together at irregular intervals, probably as often as two or three times a month, except when they were away from home. I visited and took meals at the house where they lived, and they were several times at my house.

5. State whether or not the plaintiff was kind, affectionate and attentive to the defendant, and generally his conduct towards her as a husband.

A. As far as my observation extended the plaintiff was a kind and affectionate husband. He seemed to devote as much time to his wife as his business would admit of, frequently riding with her and taking long trips from home with her. In providing and caring for his family he spent money freely, and as far as I could see she had everything necessary for her comfort and happiness. He treated her with kindness and affection, and never treated her otherwise in the many times that I saw them together.

6. Do you know the habits of the plaintiff for sobriety, industry and integrity? If so, what are they, and how long have they been so?

A. I have known the plaintiff from a child, and have been intimately associated with him ever since he was grown. He is sober, industrious, attentive to business, trustworthy and of good character and habits.

7. Do you know how long it has been since the plaintiff and defendant lived together as husband and wife? If so, state how long.

A. Plaintiff and defendant have not lived together since October, 1891.

8. So far as you know from your personal knowledge, was
271 the separation between the plaintiff and defendant caused by the fault of the plaintiff?

A. So far as I know said separation was not caused by the fault of the plaintiff. If she had been a properly disposed woman, and had been willing to do her duty as a wife, they would have been living together now. This is my belief, based on my knowledge and observation of them.

9. Were you present at the marriage of the plaintiff and defendant? If so, when did it occur?

A. I was not present at the marriage of plaintiff and defendant.

10. State anything else you may know of interest to the parties in this litigation.

A. I think of nothing further at this time.

By CLERK:

2. Are your statements in the foregoing answers made from your personal knowledge? If not, which of them are made from information and belief, and what is your source of information or foundation of your belief?

A. I have answered from my own knowledge entirely.

3. Have you any interest in this action, direct or indirect? If so, what is it?

A. I have no personal interest in the case.

4. Have you stated all you know corcerning this action? If not, state what you have ommitted.

A. I have stated all that I can think of as known to me in the matter.

L. G. CRAWFORD.

Mrs. ANN T. MCNAIRY, a witness herein for plaintiff, being duly sworn this 3d of March, 1893, neither party, agent, nor attorney being present, deposes and says:

1. State your name, age, residence and occupation.

272 A. Mrs. Ann T. McNairy, of legal age, residence, Paducah, Ky.

2. State what, if any, relation you are to the plaintiff or defendant.

A. I am not related to either plaintiff or defendant herein.

3. State whether or not you are on terms of intimacy with the plaintiff, or the defendant, or the father or mother of the plaintiff.

A. I have known plaintiff intimately from his infancy. Have only known defendant since her marriage to the plaintiff, when I met her in her home in Louisville, Ky. Have known plaintiff's father and mother intimately since childhood.

4. State what opportunity you have had to observe the conduct of the plaintiff and defendant towards each other during the time they lived together as husband and wife. State whether, in that time, you were a visitor at any house where they resided, and how frequently and how intimately you were within that family circle.

A. My intimacy with the plaintiff's father and mother is such that I was like one of the family when visiting there, and I had the opportunity which personal observation would give under the circumstances. I made three visits to the Atherton family, at their home in Louisville, Ky., after the marriage of plaintiff and defendant. These visits were of from ten days to two weeks duration each, and the plaintiff and defendant were at home and residing in the house, reaching home from the South during one of my visits. Each day I was with them frequently there together. I also saw them together once for a short time in New York. Plaintiff was

always kind, effectionate and attentive towards his wife and his conduct was that of a good and loving husband.

273 5. State whether or not the plaintiff was kind, affectionate and attentive to the defendant, and generally his conduct towards her as a husband.

A. This is answered fully in above answer No. 4.

6. Do you know the habits of the plaintiff for sobriety, industry and integrity? If so, what are they, and how long have they been so.

A. Plaintiff's — for sobriety, industry and integrity are good, as far as I know. I never saw him nor heard of his being under the influence of liquor.

7. Do you know how long it has been since the plaintiff and defendant lived together as husband and wife? If so, state how long.

A. I do not know of my own personal knowledge, how long it has been since the plaintiff and defendant lived together as husband and wife.

8. So far as you know from your personal knowledge, was the separation between the plaintiff and defendant caused by the fault of the plaintiff?

A. So far as I know of my personal knowledge, the separation was not caused by any fault of the plaintiff.

9. Were you present at the marriage of the plaintiff and defendant? If so, when did it occur?

A. I was not present at the marriage of plaintiff and defendant.

10. State anything else you may know of interest to the parties in this litigation.

A. I can think of nothing further of interest to the parties or either of them, in this litigation.

By CLERK:

2. Are all your statements in the foregoing answers made from your personal knowledge? If not, which of them are made

274 from information and belief, and what is your source of information or foundation of your belief?

A. I have answered only from my own personal knowledge.

3. Have you any interest in this action direct or indirect? If any, what is it?

A. I have no personal interest in this suit.

4. Have you stated all you know concerning this action? If not, state what you have omitted.

A. I have told all I can think of as known to me. I can think of nothing whatever that would alter the truth of my above answers.

ANN LEE McNARY.

I, R. C. Tevis, an examiner of Jefferson county, Ky., do certify that the foregoing depositions of Geo. W. Nuchols, L. G. Crawford and Mrs. A. L. McNary, all of whom are known to me as worthy of credit, witnesses herein for the plaintiff, were taken, subscribed, and sworn to before me in Louisville, Ky., on the dates named in the

different captions, neither party, agent nor attorney being present. Said depositions were written by me in presence of said witnesses respectively, were read to them by me, and by them signed in my presence, each having been first duly sworn.

Witness my hand this 4th day of March, 1893.

R. C. TEVIS,
Examiner, Jeff. Co., Ky.

275 Jefferson Circuit Court, Law and Equity Division.

P. L. ATHERTON, Plaintiff,
vs.
MARY G. ATHERTON, Defendant.

Interrogatories for Plaintiff to be Addressed to Frank Miller.

FRANK MILLER, a witness for the plaintiff, being duly sworn this 2nd day of March, 1893, neither party, agent, or attorney being present, deposes and says:

1. State your name, age, residence and occupation, and how long such has been your occupation.

A. Name Frank Miller, age 44 years, residence Louisville, Ky., occupation secretary and treasurer of the J. M. Atherton Company, since its organization, July 1st, 1881.

2. State how long you have known the plaintiff, and where he resided during that time, and where he now resides?

A. I have known the plaintiff all his life; he lived near New Haven, Ky., which is my native place, until he was 10 or 12 years of age; since then he has resided in Louisville, Ky., where he now lives.

3. What are, and have been since you knew him, the habits of the plaintiff for sobriety, industry and integrity?

A. The habits of the plaintiff for sobriety are good. He drinks intoxicating liquors very rarely, and I have never seen nor heard of his having been under the influence of liquor; he is a very
276 active man, and has always been busy when his health would permit, and his integrity has never been doubted.

4. Do you know the defendant, Mary G. Atherton? If so, when did you become acquainted with her?

A. I know said defendant; I met her soon after her marriage to plaintiff.

5. What opportunities have you had for observing the relations between the plaintiff and the defendant while they lived together as husband and wife? Where did they so live together, and what was the bearing of the plaintiff towards the defendant?

A. Their home was in Louisville, Ky.; I met them several times at their residence and occasionally at our office; the bearing of the plaintiff towards the defendant was always affectionate; I never saw an unkind act nor heard an unpleasant word spoken while in their presence.

6. Do you know anything in the conduct or habits of the plaintiff which would justify the defendant in separating from him and continuing to live apart from him?

A. I do not know anything in the conduct or habits of the plaintiff which would justify the defendant in separating from him and continuing to live apart from him.

7. Do you know how the plaintiff provided for the defendant; and what opportunity have you had for knowing the family expenses of the plaintiff during the time that the defendant and he lived together as husband and wife?

A. I do; my intimate acquaintance and association with the plaintiff, and being frequently at their home, gave me ample opportunity to see how the house was furnished and supplied, and how they lived; then in my position as secretary and treasurer of
277 the J. M. Atherton Co., I was familiar with the account of the plaintiff on the books of said company.

8. State whether or not the plaintiff made provision for the comfort of the defendant, and what were his family expenses?

A. Plaintiff did make such provision and bountifully; their home was supplied with the luxuries as well as the necessaries of life, and the defendant was always comfortably and suitably dressed when I saw her. She had horses and vehicles at her command. A copy of plaintiff's account on the books of the J. M. Atherton Co. is filed herewith marked "Exhibit F. M. No. 1" with this deposition. The account shows that the expenditures from January 1, 1888, which is a date only two or three months after their marriage up to July 1, 1891, were about $30,000, but the amount contains items for business, life insurance, etc., as shown by the items themselves, which have been embraced into one statement marked "Exhibit F. M. No. 2" herewith.

9. State what money has been sent by the plaintiff to the defendant since October 1, 1891; how much money was sent and whether you have received any receipts therefor; and file with your deposition one or more of such receipts, and state the character of those you do not file.

A. I have paid and remitted to the defendant, Mary G. Atherton, for herself and child under instructions of plaintiff, and charged to his account on the books of the J. M. Atherton Co., from October 1st, 1891, to January 1st, 1893, the following sums:

Oct. 14, 1891	$250.00
Nov. 2, "	180.00
278	
Dec. 2, "	125.00
Jan. 9, 1892	125.00
Feb. 4, "	125.00
Mc'h 1, "	125.00
April 2, "	125.00
May 9, "	187.50
June 7, "	187.50

July 2,	"	187.50
Aug. 2,	"	187.50
	Am't over.....	1,805.00
Sept. 2,	"	187.50
Oct. 3,	"	187.50
Nov. 3,	"	187.50
Dec. 1,	"	187.50
		$2,555.00

The remittance of December 1, 1892, $187.50, was returned. I think I received receipts for remittances above mentioned, except the first mentioned payment of $250.00 which was handed to her and no receipt taken. I find nearly all the receipts on file in the office of J. M. Atherton Co. and think a careful search will find all. I file herewith one receipt dated April 5, 1892, in acknowledgement of one remittance above mentioned and mark the same "Exhibit File No. 3." The other receipts are similar to the one filed except that they were not all sent from the same place.

10. State anything else you know of interest to the parties herein.

A. I have answered all the interrogatories truthfully and fully and have omitted nothing that I think is pertinent to the case.

279 By CLERK:

2. Are all your statements in the foregoing answers made from your personal knowledge? If not, which of them are made from information and belief, and what is your source of information or foundation of your belief?

A. I have answered entirely from my own knowledge, except where I have indicated in my answers the sources of my information respecting the accounts.

3. Have you any interest in this action, direct or indirect? If nay, what is it?

A. I have no material interest in this suit.

4. Have you stated all you know concerning this action? If not, state what you have omitted.

A. Answered above in answer No. 10.

FRANK MILLER.

I, R. C. Tevis, an examiner of Jefferson county, Ky., do certify that the foregoing deposition of Frank Miller, a witness for the plaintiff, known to me as worthy of belief, was taken in the city of Louisville, Ky., on the date named in the caption hereto, neither party, agent, nor attorney being present. Said deposition was written by me in the presence of said witness, was read to him by me, and by him signed in my presence, he having first been duly sworn.

Witness my hand this 4th day of March, 1893.

R. C. TEVIS,
Examiner, Jeff. Co., Ky.

Said Exhibits "Ex. F. M. No. 1," "Ex. F. M. No. 2," and "Exhibit File No. 3" are as follows, to wit:

280 "EXHIBIT F. M. No. 1" WITH DEP. OF FRANK MILLER.

Mr. Peter L. Atherton in acc't with the J. M. Atherton Co.

1889.			Dr.
Jan'y.			
	To balance		$2,667.75
11.	Theo. F. Tracey	$34.55	
	Stern	37.49	
	Fraser	15.15	
12.	Sundry bills	61.65	
19.	Seashols	79.42	
23.	Self	125.	
	Bodine	40.	
	E. Leib	56.50	
	Sid Platt	51.90	
	McCullough	44.	
	Flexner & Stadeker	51.35	
	M. S. Koehler	20.91	
			617.92
Feb'y.			
8.	Self 150.00, Trip 100.000	250.	
25.	N. Y. exc. to Thomasville	150.	
	D'ft Pensacola	100.	
M'ch.			
7.	P. F. Walsh	160.	
	D'ft Thomasville	150.	
25.	Do.	150.	
Apr.			
6.	Prem. life ins	383.	
9.	Draft	100.	
12.	Do. New Orleans	125.	
15.	Pendennis to Apr. 1st	16.40	
25.	D'ft Pass Christian	75.	
26.	Self	125.	
27.	Mrs. W. G. Atherton	150.	
			974.40

281

May.			
2.	T. B. Armstrong	25.	
3.	Self, 40.00 and 75.00	115.	
4.	Augustus Sharpe	281.04	
7.	Self	40.	
9.	E. L. Davison	100.	
10.	Kendricks	31.75	
11.	Brandeis	200.	
13.	Self	75.	

15.	Do.	25.	
21.	Brockenbrough	10.	
29.	Self	100.	
	Life ins	4.59	
			1,461.79
June.			
8.	Nellie Carson	32.80	
12.	Self	500.00	
			532.80
	For'd		7,214.66
July.			
1.	Am't brought for'd		7,214.66
	Deposit Bank of Ky	75.	
20.	Draft of T. W. Hinde	150.	
31.	Bethesda Springs	16.15	
			241.15
Aug.			
2.	E. Lieb	16.50	
	Griffith & S	8.88	
3.	Dep. B'k of Ky., self 100.00, wife 75.00	175.	
5.	Check d'ft Clinton	75.	
	Moody	26.20	
9.	City taxes	4.10	
14.	Draft	75.	
20.	Brandeis	200.	
29.	Do.	356.25	
30.	Draft	60.	
			996.93
282			
Sept.			
10.	Exc	56.68	
19.	Clinton draft	125.	
26.	Do.	125.	
30.	Deposit B'k of Ky	270.97	
			577.65
Oct.			
1.	N. Y. Exc	200.	
2.	Sid Platt	52.10	
4.	Self	40.	
7.	C. Lewis Diehl	21.95	
12.	Self	75.	
16.	Saratoga trip	50.	
21.	Pendennis Club	30.38	
			469.43
Nov.			
4.	Draft	100.	
5.	Do. Boston	225.	
7.	Do. do.	62.65	
11.	Do.	150.	

14.	Cash	5.	
20.	Dep. B'k of Ky., self 200.00, wife 200.00	400.	
23.	Draft	200.	
30.	Do. Clark	32.24	
			1,174 89
Dec.			
16.	Draft	200.	
21.	Do.	135.	
	Myers & B.	87.85	
	Cash	60.	
23.	Draft	166.25	
24.	Cash	300.	
27.	Cash	25.	
			974.
	For'd		11,648.71

283

1890.

Jan'y.			
2.	Am't brought for'd		11,648.71
	Cash	100.	
	Kleinhan & S.	28.48	
	Rosenham.	12.	
	Lewis Diehl	9.49	
	E. Lieb	18.50	
4.	Geo. Wolf & Co	51.25	
9.	Deposit B'k of Ky., self 100, wife 150	250.	
10.	Brown F. Co.	9.	
24.	Draft	75.	
			553.72
Feb'y.			
6.	Cash	50.	
8.	Do.	50.	
10.	N. Y. exc.	306.45	
11.	Cash	100.	
25.	Sundries	300.	
28.	Draft	200.	
			1,006.45
M'ch.			
3.	N. Y. exc.	70.	
7.	Cash	50.	
8.	Bayless	14.63	
10.	E. Lieb 8.50, Pendennis 20.55	29.05	
	Cash	125.	
11.	Sundry bills	137.45	
	Dr. Allen bill	40.	
13.	Com'l Club 10.00, cash 50.00	60.	
19.	Sundry bills	250.	
	German bank	100.	
21.	Dr. Cottell 70.00, cash 50.00	120.	
			996.13

April.			
3.	Cash 200.00, 5th cash 50.00	250.	
284			
5.	Life ins. prem	283.	
19.	Rassineir	17.70	
	McKnight 2.60, Moody 110.00	112.60	
	Cash 50.00, Creighton 15.55	65.55	
23.	Draft 64.35, Pendennis 15.87	80.22	
28.	Cash	150.	
			1,059.07
May.			
2.	Looms 143.60, cash 50.00	193.60	
6.	McCullough	118.25	
	Dep. B'k of Ky	50.	
	Ewing for horse	260.	
10.	Griffith 12.95, cash 350.00	362.95	
16.	Sundries	850.	
23.	Cash	75.	
27.	Ins. premium	459.	
28.	Seashols 58.00, N. Y. exc. 33.50	91.50	
			2,460.30
			17,724.38
1890.			
June.			
	Am't bro't forward		17,724.38
2.	Wolf 37.00, McCullough 43.50	80.50	
4.	Farnan & W. G. Atherton	300.	
5.	Hooper 40.00, Rassinier 6.25	46.25	
6.	C. T. Miller 72.65, Moody 39.20	111.85	
7.	Check 100 00, 20 check 150.00	250.	
20.	Kaye 17.45, Myer & B. 234	251.45	
24.	Check 125, Lieb 18.50	143.45	
			1,183.55
July.			
1.	Diehl	32.05	
23.	Draft, Cresson, Pa	445.	
24.	P. F. Walsh	154.50	
29.	Saratoga 12.00, self 100.00	112.	
24.	Bank of Ky	400.	
285			
31.	Nugent 105.11, Wrampelmeier 91.90	197.01	
	Sid Platt 31.00, Dr. Monroe 20.85	51.85	
	Myer B. & Co. 13.00, P. Valley Hotel Co. 50.00	63.	
			1,455.41
Aug.			
1.	Kleinhaus 20.00, Bodine 35.00	55.	
5.	Klauber 21.30, Sharpe 94.47	115.77	

	Kendrick 67.35, Cresson, Pa., 50.90.....	118 25	
6.	Myer 29.35, self 50.00.....	79.35	
12.	Pendennes 18.25, Bennett 69.85....	88.10	
16.	Self 50.00, 23rd, self 150.00....	200.	
			656.47
Sept.			
1.	Self 100.00, Looms 42.80.....	142.80	
3.	Ewing 28.45, B'k Ky. 125.00.....	153.45	
8.	Photo 6.50, sattel-ites 35, self 50.00.....	91.50	
15.	Seashols.....	540.78	
	Self 50.00, Verhoef 23.25.....	73.25	
17.	Self 50.00, exc. 75.00.....	125.	
19.	Am. Co. 17.00, self 50.00..... ...	67.	
25.	Williams 25.75, self 40.00.....	65.75	
			1,259.53
Oct.			
1.	Wolf 16.00, wife 50.00.....	66.	
20.	Mrs. Seller 15.00, Harthill 57.87..... ...	72.87	
27.	Pendennis 23.22, Schurman 25.25.....	48.47	
30.	Wife 50.00, self 50.00, J. C. Lewis, 15.23..	115.53	
			302.87
Nov.			
3.	Looms 24.65, wife 50.00, self 10.00.....	84.65	
286			
10.	Self 380, Wrampelmeier 10.50.....	390.50	
Nov.			
18.	B'k of Ky. 100.00, Kaye, 74.65.....	174.65	
21.	Lou. Mfg. Co. 17.50, self 100.00.....	117.50	
			767.30
Dec.			
3.	Self 75.00, Myers & B. 57.25.....	132.25	
	Miss Hampton 64.50, self 105.00.....	169.50	
15.	Hay 22.25, self 100.00.....	122.25	
18.	Wife 50.00 (24), self 100.00, self 75.00....	225.	
			649.
	For'd.....		23,998.51
1891.			
	Am't bro't for'd.....		23,998.51
Jan'y.			
2.	Self 200.00, Klauber 45.00.....	245.	
8.	" 250.00, Walsh 58.60.....	308.60	
10.	Leib 55.00, Dr. Monroe 25.00.....	80.	
	Flexner 48.70, Ingersoll 45.25.....	93.95	
	Tiffany 43.80, Mordue 10.00...	50.80	
15.	Augustus Sharpe.....	418.08	
16.	Harthell 17.25, self 50.00.....	67.25	
23.	Hay 25.60, Pendennis 47.38, self 100.00..	172.98	
			1,439.66

Feb'y.		
5. Wolf 30.00, self 75.00	105.	
13. Self	200.	
19. J. C. Seashols & Co	596.40	
13. Dep. Bank of Ky	200.	
19. Draft Na	100.	
		1,201.40
M'ch.		
2. Bayless 16.00, d'ft 30.00	46.	
7. Draft 125.00, d'ft dis. 27.64	152.64	
287		
16. Fraser 7.50, Zorn 23.23	30.83	
24. Dep. B'k of Ky., s'f and wife	170.54	
30. C'k J. M. A	100.	
31. B'k of Ky. overcheck	194.05	
		694.06
Apr.		
4. Adams Express Co., trunk	65.40	
6. Life ins. premium	383.	
D'ft Tallahassee	286.84	
10. Guthrie 21.00, Brandeis 28.77	49.77	
14. B'k of Ky. 300.00, German b'k 346.25	646.25	
16. Sid Platt 34.10, self 100.00	134.10	
17. Pendennis 17.35, B'k Ky. 50.00	67.35	
Pay't on street-car stock	425.	
21. J. W. Gosling 596.02, self 40.00	636.02	
3. Self 40.00, B'k Ky. 465.00	565.	
		3,258.73
May.		
6. Threlkeld 35.00, self 250.00	285.	
12. Self, 4 bills, 95.50, self 75.00	170.50	
23. Myers & B. 150.00 (28th) Pendennis 31.88	181.88	
Car-works stock	200.	
27. Prem. life ins	459.	
29. J. C. Seachols & Co	164.20	
		1,460.58
June.		
1. Check 100.00, 2d 100.00, 8th 50.00, 13th 100.00	350.	
15. Wife 60.00, 25 fr't horses, &c., 54.00	114.	
27. D'ft T. W. Hinde	120.	
Paid at distilleries, spr. '91	107.49	
		691.49
		32,744.43
Less credit statement attached		27,417.93
		5,326.50

288 Mr. Peter L. Atherton in acc't with the J. M. Atherton Co.

1889.		Cr.
June 10.	J. M. Atherton (settlement)	$8,495.58
29.	Salary 6 months	1,000.
Dec. 31.	" "	1,000.
1890.		
Jan. 31.	Jno. McKenna	50.
June 30.	Salary 6 mos	1,000.
Aug. 5.	J. M. A., int. on note	1,200.
	Div. on 1 share	20.
	J. M. A. to July 1, 1890 (bal. acc't)	7,362.35
Dec. 31.	6 mos. salary	2,500.
1891.		
June 8.	J. M. A	2,290.
30.	Salary 6 mos.	2,500.
		$27,417.93

"Exhibit F. M. No. 2" with Dep. of Frank Miller.

Business Items.

1889.		
April 6.	Prem. life ins.	$383.
May 9.	E. L. Davison	100.
11.	Brandeis	200.
29.	Life insurance	459.
June 12.	Self	500.
Aug. 20.	Brandeis	200.
29.	Do.	356.25
Nov. 5.	Draft Boston	225.
23.	"	200.
Dec. 16.	"	200.
24.	Cash	300.
1890.		
M'ch 19.	German bank	100.
289		
April 5.	Life ins. prem	383.
27.	Do.	459.
1891.		
Apr. 6.	Do.	383.
14.	Bank of Ky	300.
	German bank	346.25
17.	Pay't on street-car stock	425.
May 23.	Car-works stock	200.
27.	Life ins. prem.	459.
		$6,178.50

M. C. K. A.

Frank Miller, Esq.

DEAR SIR: Your favor of the 2d inst., containing N. Y. exchange for $125.00, received and hereby acknowledged.

Yours truly, MARY G. ATHERTON.

Lancaster, Mass., April 5th, 1892.

"Exhibit F. M. No. 3," dep. of Frank Miller.

Jefferson Circuit Court, Law and Equity Court.

P. L. ATHERTON
vs. } 5248.
MARY G. ATHERTON.

JOHN M. ATHERTON, a witness herein on behalf of plaintiff,
290 being duly sworn this 1st day of March, 1893, neither party nor agent being present, deposes and says:

1. State your name, age and residence.

A. Name John M. Atherton, age 51 years, residence Louisville, Ky.

2. Answer the following questions in regard to your family: (1) Have you been married more than once? (2) What is your wife's name and age? (3) What children have you?

A. No; Maria B. Atherton, 50 years; have one son, P. L. Atherton, and have never had any other children.

3. Is the plaintiff in this case the same person whom you have described as your son?

A. He is the same; he was born in Larue county, Ky., Oct. 7th, 1862; resided in said county until 1873, and since that time in Louisville, Ky.

4. Do you know of your own knowledge whether plaintiff and defendant are married, and how do you know it?

A. Yes; was present at their marriage.

5. Where did plaintiff and defendant reside after their marriage, and for how long did they reside there?

A. They resided in Louisville, Ky., from the fall of 1888 to October, 1891.

6. Were any children born of the marriage between plaintiff and defendant? If so, state name and age.

A. One child was born to them, a daughter, name Mary Valeria Atherton, born January 8th, 1890.

7. In what business are you engaged? Give the style of your company—whether it is a firm or corporation; what position you have in it; and also state whether you are connected with any other firms or corporations.

A. Am engaged in distilling Ky. whisky and wholesale
291 dealing in same; style, "The J. M. Atherton Co.," a corporation; am president of same; I am and have been since 1881 a director of the Bank of Kentucky, and for several years director

of the Louisville Gas Company and of the Franklin Insurance Co. and of Ohio Falls Company.

8. What is the business of the plaintiff, and how long has it been such? If you say that he is connected with any firm or corporation, state in what capacity.

A. Plaintiff is in the employ of the J. M. Atherton Co. in the capacity of general utility, visiting important cities as salesman and superintending repairs and construction at distilleries for said company. He is now and has been for some time past vice-president of the company.

9. What are and have been plaintiff's habits as to sobriety and industry?

A. His habits as to sobriety and industry are good and have always been so. He rarely touches liquors of any kind and then only in small quantities. He has always been too industrious for his health.

20. Do the plaintiff and defendant live together? If not, state how long they have lived apart.

A. No. They have lived apart since October, 1891.

11. If you state that they are living apart, state when and under what circumstances the separation occurred.

A. The separation occurred October 3d, 1891. They were at their home in the city. I saw them as usual in the morning and when I returned home about 12 m. the same day, defendant had left the house taking with her the child.

12. During the time that plaintiff and defendant lived together, what opportunities did you have for observing their conduct towards each other?

292 A. Living in the same house, I had all the opportunities which such association would afford. I saw them separately and together, and was with them more or less, every day when we were all at home, and saw them when they were absent from home.

13. Was or not the plaintiff a good husband to defendant? Did he provide for her well or ill? Did he furnish her with money and apparel, and did he give her the benefit of travel, and what was the character of such provision?

A. He was a good husband. He provided for her generously, and furnished her with money and suitable apparel and gave her the benefit of travel and of social enjoyment. He did everything, so far as I know, which a generous husband could do or a reasonable wife want or expect.

14. Was or not plaintiff kind and affectionate to the defendant?

A. He was kind and affectionate to defendant, and suffered painfully in mind and body when his wife's conduct, even for a short time, was unpleasant.

15. Was or not the defendant contented in her marriage with the plaintiff? If you say that she was discontented, state what were the grounds of this discontent, and state generally how it was manifested.

A. Defendant was not contented. She objected from the beginning to plaintiff's love and affection for his mother, was dissatisfied

with plaintiff because his health was not good and because he took usual interest in his business. At times she was cheerful and happy, but at other times expressed and exhibited great discontent, and often much temper, if plaintiff's health or business interfered with her amusement or pleasure.

16. Did this discontent increase or diminish as time went on?

293 A. This discontent was increased, so far as I could see, until the fall of 1890, when for a while she appeared more contented and satisfied, but after her return here in the spring of 1891, after the death of her father, she appeared more dissatisfied than ever, and more determined not to identify her life with her husband's.

17. Did you, or not, during the time that the plaintiff and defendant lived together, make any effort to remove any ground of discontent on the part of the defendant in her marriage, and with what result?

A. I did make such effort, but without success. In one interview she said she would not renew the trouble-, but drop them and be content, but was that night, without any cause, in a hysterical rage of passion.

18. State the circumstances, as well as you know them personally, under which the defendant left the house where she and the plaintiff had been residing. Were any efforts made by the plaintiff upon that day or the next to induce the defendant to return to her husband's residence? if you say yes, state what such efforts were, so far as they are within your own personal knowledge?

A. When I came home about 12 m., Oct. 3rd, 1891, plaintiff, who was in the sitting-room on the first floor, asked me to go upstairs and talk to defendant about what had occurred that morning after I left the house; I went up to her rooms but she was not there, and I could not find her nor the child in the house; I at once informed the plaintiff, and he and myself inquired after the defendant and the child; no one about the house knew of her leaving until we met the coachman at the stable, who said that defendant had passed him while he was at work at the stable, from one-half to

294 three-quarters of an hour before, and had gone out Third street with the child; I went at once out Third street to the house of an acquaintence to find if defendant was there; she was not there, and returning home I met plaintiff in his buggy near corner Third and York; he said, on hearing I had not found defendant, that he would go to the house of an acquaintance on Fourth street, and immediately drove to the house; I saw him enter the house, and in a short time come out, getting into the buggy; I called to him near Fourth and York, and he told me defendant was in that house; at plaintiff's request, that night or the following night, I am not certain which, I asked Judge Humphrey to call on Mr. McDermott, defendant's counsel, and ask him to inform defendant that plaintiff requested her to return to her home, and that if she would do so he would not disturb the child, and that his father and mother joined in the request.

19. State whether or not, within a few days succeeding this, any persons came to Louisville as the friends and representatives of defendant; and if you say yes, state who those persons were, and what, if any, counsel the defendant had in Louisville, Kentucky?

A. From my best knowledge and belief, on the following Monday, October 5th, 1891, there came to the Galt house in this city, defendant's aunt, Miss Goodman, and defendant's sister, Mrs. Evans, and Mr. Evans, her husband, and Mr. Goodman, defendant's cousin, and an attorney, Mr. C. D. Adams, of Utica, New York; Mr. E. J. McDermott was defendant's Louisville attorney.

20. State whether or not you were present at any conference between the friends and counsel of the plaintiff and the defendant after the arrival of the persons mentioned above.

295 A. I was present at such a conference.

21. State who was present at that conference, and where it was held.

A. Messrs. Adams and McDermott, as counsel, and Mr. Goodman, as friend of defendant, met Humphrey & Davie, as counsel for and myself as friend of plaintiff, in this city, in the law office of Humphrey & Davie.

22. State what was said by the persons representing the defendant and those representing the plaintiff, as preliminary to such conference.

A. When the parties named in preceding answer met on the following Wednesday, one of defendant's counsel asked plaintiff's counsel what suggestions the latter had to make. The latter replied that plaintiff's request, that his wife return to her home, had not been answered, and *and* that an answer to that request should be given, as no conference would be necessary if defendant complied with the request and returned to her home. I related the facts as stated in the latter part of my answer to question 18 as to the message sent by plaintiff to his wife by me, through Judge Humphrey and Mr. McDermott, that plaintiff wished his wife to return to her home. Mr. McDermott then said he had received the message and gave it to defendant, I think, the following morning. In a short time after this, and following some further suggestions on the subject, defendant's counsel said it was useless to devote any more time to the subject of defendant's return to her home, as she would not return, and the conference had as well take up the question of what should be done with the child. Plaintiff's counsel then asked that it be understood that, pending any conclusion on that subject, the child would not be taken from the State, but remain in this city, and it was so understood between the counsel of both sides.

296 23. State how long this conference lasted, and with what result.

A. After the preliminaries, given in the preceding answer, the conference begun concerning the child, and continued until the following Saturday evening, adjourning from day to day, as counsel expressed desire to report to defendant and confer with her and her friends, and be prepared to act when conference met again. An

agreement was reached Saturday afternoon, which provided for a joint guardianship or custody of the child until she was 14 years old—the defendant and plaintiff's mother, Mrs. Maria B. Atherton, being made joint guardians or custodians of the child. The child was to spend four months of each year in charge of plaintiff's mother until five years old, and after that six months of each year. Plaintiff made provision for the support of the child during the time she was in defendant's charge, and instructed me to consent to such provision for defendant as would enable defendant to properly care for the child when in her custody. I herewith file copy of agreement, which will more fully answer the question, and mark the same "Ex. A" as part of the deposition.

24. State when you last saw the child of the plaintiff and defendant prior to January 1, 1892?

A. Three or four days after the agreement above explained was made, when the child was sent to my house by defendant; this was the last time I saw the child prior to Jan. 1, '92.

25. State when you next saw the child, and for how long?

A. I next saw the child about the 7th or 8th of January, 1892, when she was returned by defendant to the custody of plaintiff's mother, and she remained in our family until the last of April, 1892.

297 26. State when you last saw the child.

A. I last saw the child in the last of April, 1892, when plaintiff's mother started from this city with the child to return her to defendant, and according to my best knowledge and belief did at that time return her to the custody of the defendant.

27. Has, or not, your wife, Mrs. Maria B. Atherton, been able and willing to receive and care for the said child, and to control its abode, travel and custody from January 1, 1893, and if you say yes, then state why she has not had such control since that date?

A. My wife, Mrs. Maria B. Atherton, has been able and willing and anxious to receive and care for the child, and expected defendant to return the child to her on January 1, 1893, until, in November, 1892, defendant, through her trustee named in the agreement, Henry P. Goodman, and who was at the conference above described, notified plaintiff's counsel that she would not return the child, and she has not returned her, as provided in the agreement; that explains why the child is not here now in the custody of my wife.

28. Do you know anything in the conduct of the plaintiff towards the defendant, or in his life or habits, which justifies the separation of the defendant from the plaintiff, and her continued living apart from him? If so, state what that is.

A. I know nothing in the conduct of the plaintiff towards the defendant or in his life or habits which justified the separation of the defendant from the plaintiff; on the contrary, so far as I know, and so far as I could judge from what I saw and knew, plaintiff wanted to make his married life happy, and tried to do so, and enjoyed doing what would or should have made his wife happy and contented.

298 29. What is the pecuniary condition of the plaintiff?

A. Plaintiff is worth about $20,000.00; I cannot state the exact amount, but it will not vary much from that amount.

30. Do you know why Mrs. Maria B. Atherton was selected as the joint guardian of Mary Valeria Atherton, instead of P. L. Atherton being so selected? Especially state whether such selection was made by reason of any unfitness upon the part of said Peter Lee Atherton to be such joint guardian? Is, or not, the plaintiff fitted for having the care and custody of his child?

A. During the conference referred to in the previous answers I suggested that my wife, Mrs. Maria B. Atherton, be made coguardian or custodian of the child instead of the plaintiff, Peter Lee Atherton, as it would be unpleasant if not impossible for him to communicate with the defendant about any matters affecting the child, or to report her condition to defendant, when child was here, or to receive report of the child's condition when in custody of the defendant. Plaintiff readily consented and approved of this suggestion when made known to him and the suggestion was made solely for above reasons and not on account of any unfitness of plaintiff to be joint guardian, or custodian or to have the care and custody of the child, and there was no reference made or question raised in the conference by any one intimating any unfitness on the part of the plaintiff. Plaintiff is fitted in every way for having the care and custody of his child.

By CLERK:

2. Are all your statements in the foregoing answers made from your personal knowledge? If not, which of them are made from information and belief, and what is your source of informa-

299 tion or foundation of your belief?

A. I have answered the above in every instance from my own knowledge except where I have in my answer explained the nature of my information.

3. Have you any interest in this action direct or indirect? If any, what is it?

A. I am not a party to the case and have no pecuniary interest or obligation growing out of it. Being the father of plaintiff and grandfather of the child, I have a personal interest growing out of love and affection.

4. Have you stated all you know concerning this action? If not, state what you have omitted.

A. I have stated everything I believe pertinent to the matters about which I have been interrogated, so as to give correct and truthful answers, and have omitted nothing which could have been, if given in reply to any interrogatory, at variance with the answers herein given, or of any disadvantage to the plaintiff or of any advantage to the defendant in this action.

JOHN M. ATHERTON.

I, R. C. Tevis, an examiner of the Jefferson county court, do certify that the foregoing deposition of John M. Atherton, in behalf of the plaintiff, was taken in the city of Louisville, Ky., on the date named

in the caption hereto, neither party, agent, nor attorney being present, and said witness being known to me as a man of truth and veracity. Said deposition written by me in the presence of said witness, was read to him by me and by him signed in my presence, he having first been duly sworn.

Witness my hand this 4th day of March, 1893.

R. C. TREVIS,
Examiner, Jeff. Co., Ky.

300 DEFENDANT'S "EXHIBIT No. 7."

Separation Argument *of Oct.* 10, 1891.

Said "Exhibit A," filed with the deposition of J. M. Atherton, is in words and figures as follows, to wit:

The undersigned, Peter Lee Atherton, and his wife, Mary G. Atherton, having ceased to live together as man and wife, without in any way acknowledging upon whom is the fault, or condoning the conduct of the one or the other which has led to the existing state of affairs, or preventing any consequence which may follow, or right which may arise to either party if such status shall continue, desire to provide for the best interest of their child, Mary Valeria Atherton. With this view they have entered into the following agreement:

Peter Lee Atherton contracting with Henry P. Goodenow as trustee for Mary G. Atherton, and said trust- contracting with Peter Lee Atherton on behalf and jointly with Mary G. Atherton.

1. The child is hereby committed for its nurture, education, and control to the joint custody and guardianship of her mother, Mary G. Atherton, and her paternal grandmother, Maria B. Atherton, on the following basis:

The domicile of the child is to be the State of Kentucky. The mother is to have the child until January 1, 1892. During the years 1892, 1893, and 1894, the grandmother is to have the child and control its abode, travel and custody from January 1st to the first week in May; and the mother from the first week in May to December 31st. After that period, during the existence of this arrangement, the grandmother's custody, control, etc., is to exist during the
301 first four and last two months of the year; that of the mother during the other months of the year.

2. During that part of each year in which the child is under the control of the mother, Peter Lee Atherton is to pay into the hands of Mary G. Atherton $500 in installments of equal amounts at the beginning of each of the months of said control, for the comfortable maintenance of the child. During the rest of each year, he is to himself at his sole expense provide for the support of the child. The expense of conveying the child with a proper attendant, in the journey to the mother, Mary G. Atherton, is to be borne by the father, Peter Lee Atherton, and the like expense on the journey

back to the grandmother, is to come out of the sum provided for the child's support.

3. Peter Lee Atherton is to pay into the hands of Mary G. Atherton for her support $125 at the beginning of each month, until this agreement does by its own terms end. This is to be taken in lieu of alimony and dowable and distributable share in his estate.

4. The following provisions are made for the termination of this agreement and for the contingency of various events that may happen in the future; among others, divorce and second marriage of Peter Lee Atherton or Mary G. Atherton.

a. This agreement as to the child, is to terminate on her arrival of fourteen years of age, it being recognized that she will then be old enough to choose for herself. It shall, of course, in like manner terminate at her death.

b. This agreement as to the support of Mary G. Atherton
302 is to end at her death, or upon her again marrying, and in any event on the 8th day of January, 1904.

c. If Mary G. Atherton shall marry again or die, the person then being joint guardian with her of the child shall become its sole guardian. If Maria B. Atherton shall die while she is joint guardian, Peter Lee Atherton, if alive, or if he be dead, his father, John M. Atherton, shall choose a successor in the joint guardianship; and if Mary G. Atherton objects to the person so nominated, the senior (in years) judge of the Jefferson circuit court shall decide the question of fitness, and confirm or reject such nomination.

d. A successor to said successor may under similar circumstances be in like manner chosen.

e. If, during the existence of this agreement, Mary G. Atherton, being then joint guardian, John M. Atherton and Maria B. Atherton shall die, and Peter Lee Atherton die or be or become married, the sole guardianship shall rest in said Mary G. Atherton.

f. If, during the lives of Peter Lee Atherton and Mary G. Atherton, a sole guardianship shall have resulted under the terms of this agreement, each parent shall have reasonable access to and right of visitation from the child, notwithstanding such parent may have again married.

g. If a divorce shall be granted, this agreement, so far as it concerns provision for Mary G. Atherton, shall be carried into the decree, as in full satisfaction of all claim for alimony, and so far as concerns provision for and custody of the child, reserving to
303 the court the usual power to provide against events and contingencies not covered by this agreement.

Witness the signature- of all the parties this October 10th, 1891.

HENRY P. GOODENOW.
MARY G. ATHERTON.
PETER LEE ATHERTON.

In the presence of—
EDWARD J. McDERMOTT.
C. D. ADAMS.

COMMONWEALTH OF KENTUCKY, } *sct:*
County of Jefferson, }

I, John C. Cain, clerk of the Jefferson circuit court, 30th judicial district of Kentucky, and of the law and equity division thereof, do hereby certify the above and foregoing to be a true, complete and perfect transcript and copy of the record and proceedings had and entered of record, in a certain cause in the Louisville law and equity court, and the Jefferson circuit court, law and equity division, wherein Peter Lee Atherton is plaintiff and Mary G. Atherton is defendant, and of the judgment granting absolute divorce therein, as the same now remains of record in this office; and that I am the officer in whose custody the records of the Louisville law and equity court, and of the said Jefferson circuit court, law and equity division, are legally kept.

Seal Jefferson Circuit Court, Law and Equity Division, Kentucky.

In testimony whereof I hereunto set my hand and affix the seal of the Jefferson circuit court, law and equity division, at the court-house in Louisville, Kentucky, this 2d day of June, 1893.

JOHN S. CAIN,
Clerk Jeff. Cir. Court.

304 COMMONWEALTH OF KENTUCKY, } *sct:*
Jefferson County, }

I, Sterling B. Toney, presiding judge of the Jefferson circuit court, 30th judicial district of Kentucky, law and equity division, do hereby certify that John S. Cain, whose name is appended to the foregoing certificate as clerk of said court, was such clerk when said certificate was signed; was duly commissioned and qualified to act as such clerk, and that his signature, and the seal of said court thereto attached, are genuine, and entitled to full credence, and his said certificate is in due form, and he was, when said certificate was signed as aforesaid, the officer in whose custody the records of the Louisville law and equity court and of the Jefferson circuit court, law and equity division, were legally kept.

Seal Jefferson Circuit Court, Law and Equity Division, Kentucky.

Given under my hand and seal this 2d day of June, 1893.

STERLING B. TONEY, *Judge.*

COMMONWEALTH OF KENTUCKY, } *sct:*
Jefferson County, }

I, John S. Cain, clerk of the Jefferson circuit court, 30th judicial district of Kentucky, law and equity division, do hereby certify that Sterling B. Toney, whose name is subscribed to the foregoing certificate, is the presiding judge of the Jefferson circuit court, 30th judicial district of Kentucky, law and equity division, duly commissioned and qualified according to law, and was such pre-
305 siding judge at the time when his signature was affixed to said certificate. And I further certify that the signature of said Sterling B. Toney is genuine, and was affixed to said certificate in my presence.

Witness my hand and the seal of the said court aforesaid, this 2d day of June, 1893.

Seal Jefferson Circuit Court, Law and Equity Division, Kentucky.

JOHN S. CAIN,
Clerk Jef. Cir. Court.

COMMONWEALTH OF KENTUCKY, *Office of Secretary of State,* } *sct:*

I, John W. Headley, secretary of state of the State of Kentucky, do hereby certify that the Jefferson circuit court, 30th judicial district, law and equity division of the Commonwealth of Kentucky, is a court of record, having original jurisdiction of all causes both at law and in equity, in the county of Jefferson and Commonwealth of Kentucky; that said court is duly constituted; that Sterling B. Toney is the presiding judge of said court, duly commissioned and qualified according to law, and was such presiding judge at the time when his signature was affixed to the foregoing certificate; and that the signature of said Sterling B. Toney to the said certificate is genuine; and that the Louisville law and equity court of the Commonwealth of Kentucky was a court of record, having original jurisdiction of all cases, both at law and in equity, for the county of Jefferson, Commonwealth of Kentucky, and that John S. Cain is the officer in whose custody the records of said court and of the
306 Jefferson circuit court, law and equity division, are legally kept.

In testimony whereof, I have hereunto set my hand, and caused my seal of office, and also the great seal of the Commonwealth to be affixed. Done at Frankfort this third day of June, in the year of our Lord one thousand eight hundred and ninety-three, and in the one hundred and second year of the Commonwealth.

Seal Commonwealth of Kentucky, Office of the Secretary of State.

Seal Commonwealth of Kentucky. United we stand, divided we fall.

JOHN W. HEADLEY,
Secretary of State.
By EDW. O. LEIGH,
Assistant Sec'y of State.

Supreme Court.

MARY G. ATHERTON
against
PETER LEE ATHERTON.

STATE OF NEW YORK, *County of Oneida,* } *ss:*

Mary G. Atherton, being duly sworn, says that for the past year she has been, and is, a resident of the State of New York, and now is a resident of and resides at Clinton, in the county of Oneida, in

said State of New York; that she is the plaintiff in the above-entitled action; that the said action is brought for a separation from the defendant, the husband of the plaintiff, for cruel and inhuman
307 treatment of the plaintiff by the said defendant; that the said plaintiff and defendant were married on the 17th day of October, 1888, at Clinton, in said county of Oneida and State of New York; that this plaintiff has heard read *in* complaint in this action verified by her at the same time of the verification of this affidavit and the plaintiff knows the contents of such complaint, and that the said complaint and the facts therein stated are in all respects true; that the said plaintiff refers to the said complaint as a part of this affidavit.

The said plaintiff further says that the said defendant, Peter L. Atherton, is an adult over the age of twenty-one years, and is not a resident of the State of New York; that for several years past the said defendant has been, and now is, a resident of the State of Kentucky, and that during that time he has resided and now resides at Louisville, in the said State of Kentucky; that the father of said defendant for several years has been and is now a resident of and has resided and now resides in Louisville, in the said State of Kentucky, and that he has been and is engaged in an extensive business in said Louisville, and that the defendant has been for some years past and is now interested in and connected with the said business with his said father; that the said defendant resides with his said father, in said Louisville, and his residence is number 220 *West* Broadway, in said Louisville; that the said defendant has never been a resident of this State, and never has resided in this State, as this plaintiff has been informed and believes.

That the said plaintiff has caused a summons in this action to be issued in this State, and an attempt to be made to personally
308 serve the same upon the defendant within this State, but that after due diligence the said defendant cannot be found within this State, and that the said summons cannot be personally served upon him in this State by reason of his said non-residence; that by reason of said non-residence of the said defendant in this State, the said plaintiff has been unable, after due diligence, and will be unable with *due* diligence, to make or cause to be made personal service upon the defendant of said summons within this State; that as this plaintiff is informed by correspondence with persons in Louisville, Kentucky, and verily believes the said defendant is now in said Louisville, in the said State of Kentucky, and that he is not within the State of New York; that no previous application has been made in this action for an order of publication of the summons therein.

MARY G. ATHERTON.

Subscribed and sworn to before me this 11th day of January, 1893.

J. FRANK ROGERS,
Notary Public in and for Oneida Co., N. Y.

Supreme Court.

MARY G. ATHERTON
against
PETER LEE ATHERTON.

STATE OF NEW YORK, *County of Oneida,* } *ss:*

William J. Kernan, being duly sworn, deposes and says that he is a member of the firm of W. & N. E. Kernan, attorneys for
309 the plaintiff above named, and resides at Utica, N. Y.; that on the 9th day of January, 1893, deponent's said firm wrote to Andrew Cowan, Esq., at Louisville, Kentucky, to inquire if the above-named defendant, Peter Lee Atherton, is now a resident of Louisville, Kentucky, and actually living in the said city of Louisville; that on the 13th day of January, 1893, deponent's said firm received an answer purporting to come from the said Andrew Cowan, dated January 11th, 1893, and in the letter from the said Andrew Cowan he states that he understands that the above-named defendant is a resident of Louisville, Kentucky, and that his home is with his father, who resides in that place; and the said Andrew Cowan further states that he saw the defendant on the street a few days prior to the date of said letter.

W. J. KERNAN.

Subscribed and sworn to before me this 13th day of January, 1893.

REES E. THOMAS,
Notary Public, Oneida Co., N. Y.

Supreme Court, Oneida County.

MARY G. ATHERTON
against
PETER LEE ATHERTON.

The plaintiff having presented to me the verified complaint in this action, which is hereto annexed, showing a cause of
310 action for which judgment is thereon demanded against the defendant for a separation from the defendant, and having also, by the annexed affidavit of plaintiff, dated the 11th day of January, 1893, and of William J. Kernan, dated the 13th day of January, 1893, and by the certificate of the sheriff of Oneida county, made proof to my satisfaction that the defendant is not a resident of the State of New York, but resides in Louisville, in the State of Kentucky, and that personal service cannot, after due diligence, be made within this State, now on motion of W. & N. E. Kernan, plaintiff's attorneys,

Ordered, that service of the summons in the above-entitled action upon the defendant, Peter Lee Atherton, be made by publication thereof, with the notice required by law, in two newspapers, to wit:

in the Utica Daily Observer, published in Utica, N. Y., and the Utica Daily Press, published in Utica, N. Y., once a week for six successive weeks, or at the option of the plaintiff by service of the summons with the notices required by law, and a copy of the complaint and of this order upon said defendant personally without the State.

And it is further ordered and directed, that on or before the day of the first publication of the summons, the plaintiff cause to be deposited in the post-office at Utica, N. Y., a copy of the summons and hereto-annexed complaint, and of this order contained in a securely closed postpaid wrapper, directed to the following-named defendant, at the place designated below: Peter Lee Atherton, 220 West Broadway, Louisville, Kentucky.

Dated January 13th, 1893.

M. H. MERWIN, *J. S. C.*

311 Supreme Court.

Trial desired in Oneida county.

MARY G. ATHERTON *against* PETER LEE ATHERTON. } Action for a Separation.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorneys within twenty days after the service of this summons, exclusive of the day of service, and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated January 9, 1893.

W. & N. E. KERNAN,
Plaintiff's Attorneys.

Office and post-office address, Devereux block, Utica, N. Y.

Supreme Court.

Trial desired in Oneida county.

MARY G. ATHERTON *against* PETER LEE ATHERTON. } Action for a Separation.

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Dated January 9, 1893.

W. & N. E. KERNAN,
Plaintiff's Attorneys.

Office and post-office address, Devereux block, Utica, N. Y.

Supreme Court, Oneida County.

MARY G. ATHERTON *against* PETER LEE ATHERTON. } Complaint.

Mary G. Atherton, the plaintiff in this action, as and for her complaint and cause of action against Peter Lee Atherton, the defendant in this action, alleges as follows:

That on the 17th day of October, 1888, at Clinton, in the county of Oneida, in the State of New York, the said plaintiff and defendant were married and became husband and wife.

That at the time of the said marriage the said plaintiff was a resident of the State of New York and the said defendant was a resident of Louisville, in the State of Kentucky.

That after the said marriage the said plaintiff and defendant resided in said Louisville in the home of the father and mother
313 of the said defendant, Mr. and Mrs. John M. Atherton, and continued to reside there until the plaintiff left the defendant as hereinafter stated.

That on the 8th day of January, 1890, a child was born of the said marriage to the said plaintiff and defendant, being daughter, and which child was named Mary V. Atherton, and is now living with and is being cared for by the said plaintiff, its mother.

That for the reason hereinafter stated the said plaintiff, in the month of October, 1891, left the said defendant and ceased to live with him as his wife and came to said Clinton, in the State of New York, bringing with her the said child, and that the said plaintiff with her child have since resided at said Clinton, in the State of New York, and that the said plaintiff during all of the time since the month of October, 1891, has been and at the time of the commencement of this action was, and is a resident of the State of New York, residing at said Clinton in said State.

That the said defendant has continued to reside and now resides at Louisville, in the State of Kentucky, and is a resident of said State of Kentucky.

The said plaintiff further alleges that the said defendant is a man of violent and ungovernable temper.

That after the said marriage of the plaintiff and defendant, and up to the time the said plaintiff left the defendant, as hereinafter stated, said defendant, without any just reason, cause or provocation, treated the said plaintiff in a most cruel and inhuman manner, and his treatment of her was most cruel and inhuman, so that it became

and was unbearable and unsafe and improper for her to live and cohabit with him.

314 That during all of said time he repeated and frequently committed acts of violence, abuse and cruelty towards her, and particularly as follows:

That soon after the said marriage and in the month of January, 1889, at their said home in Louisville, without any reason therefor, the said defendant reproached the plaintiff with being car-less of his health, and among other things said to her she was a vain, unloving woman, and only cared for the money of the defendant.

That in the month of May, 1889, and about the 11th or 12th of May, 1889, at their said home in Louisville, the said plaintiff being then with child, desired to visit her parents at Clinton, N. Y., and expressed such desire to the defendant; that the said defendant thereupon became very angry, and violently reproached the plaintiff, and among other things, said to her that she was a false and unnatural wife and not fit to be married, and that she should not come back if she went to visit her parents; that he pulled open his secretary, seized a pistol and said it was loaded, and brandished it and threatened the plaintiff with it; so much so that the plaintiff became and was greatly frightened and feared for her life, and was fearful that he was going to kill her, and fled into another room for safety.

That in the said month of May, 1889, at their home in Louisville, on another occasion the said defendant claimed that his mother had intercepted a letter to the said plaintiff from her mother, and had opened and read it, and without showing the letter to the plaintiff or informing her of the contents of the letter, the defendant and his mother in his presence, on several occasions, threatened the said plaintiff that they would publish such letter, and that it would compromise and disgrace her mother, which greatly worried

315 the plaintiff; and the plaintiff alleges that there was nothing in the said letter which would compromise or disgrace her mother, as she has been advised and believes.

That in the month of July, 1889, the said plaintiff, with the consent of the defendant, was at her parents' home in Clinton, and accident-ly fell, which threatened serious results in the condition she was then in; that the defendant came to Clinton and remained a few days and left while the plaintiff was still confined to her bed by reason of such fall; that while the defendant was at Clinton on that occasion he was very unkind to the plaintiff; that on several occasions, without any cause or reason, he became very angry and gave way to bursts of passion, and threatened the plaintiff and her mother with the said letter of the plaintiff's mother, claimed to have been intercepted, and among other things said that the plaintiff's mother was no lady; and angrily charged that there was a conspiracy between the plaintiff and her mother to insult him, and that he would not have come to see the plaintiff at all only for the looks of it; that in the month of August, 1889, while the plaintiff was still at her parents' home in Clinton, and in the condition aforesaid, and still suffering from the effects of the said fall, the defendant was

there for several days; that while there at Clinton he was very unkind and insulting to the plaintiff; that on several occasions, without any cause or reason, he flew into a great passion, and, among other things, said to the plaintiff that he and his father had made wills cutting the plaintiff off from all their property; that to insure this he had given all his property to his father, and that she should be left penniless; that she was an unnatural wife, and that her family was vile and her father a low-lived cur and a dead beat, too lazy to support his family, and a slouch, and that she was
316 like him; that she only wanted his money to spend on her nasty family; that he did not love her, and that she did not love him, and that he would get a divorce from her; that he would not do it until the child was born, but after that he would do it; that such conduct and language of the defendant was most unjust and uncalled for and effected the plaintiff seriously and made her weep violently, and made her sick, and she told him, and he said it was all humbug, that she only pretended to be sick.

That in the month of September, 1889, and about the 22d, while the plaintiff was at said Clinton and in the condition aforesaid, the defendant was there, and without any just cause or provocation, became angry and among other things called plaintiff, *in the hearing of her sister*, a shameful wife, false and mean, said to her that she was a dirty nigger and worse than any nigger; that he would go away and not sleep another night under the roof with her or her family.

That about September 26th, 1889, the plaintiff and defendant returned to their home in Louisville, and about November 19th, 1889, with the consent of the defendant the plaintiff went to her parents in Clinton, to remain with them through her expected confinement; that about January 2d, 1890, and about a week before the birth of the child, the defendant came to Clinton to the home of plaintiff's parents, where the plaintiff was; that *was* first day he came he was very unkind to and abusive to the plaintiff, and spent the most of the first night in angrily finding fault and scolding her because he had not a larger room provided for him; and he among other things said that it was an insult to him, and intended as such; that
317 the plaintiff was of no account, and that her family despised and imposed on him, and had insulted him by giving him a smaller room than usual; the plaintiff's aunt was sick in the next room, and when informed by plaintiff of it, the defendant said she was not sick, but was up there as a spy to hear what was said; he also said the plaintiff was immodest, all of which was most unjust; that such conduct and language affected the plaintiff badly, made her weep violently and brought upon her premature pains, and nearly brought on the premature birth of the child.

That the plaintiff's child was born January 8th, 1890, and some days after its birth the defendant, at Clinton, became and was very unkind and abusive towards the plaintiff; that about January 10th, 1890, at said Clinton, without any cause, he became very angry and angrily found fault with and scolded the plaintiff because the child was in the cot where the nurse had placed it instead of in the

bed with plaintiff; that among other things he said to plaintiff that she was an unnatural mother, and did not love her child, or she would have it in bed with her; that even the beasts loved their young, but she did not.

That when the child was only three days old the defendant insisted he would stay in the plaintiff's room during the night; the plaintiff remonstrated with him, and told him he could not, as she required the attendance of the nurse; whereupon the defendant became very angry and abusive to the plaintiff, and said to her among other things, that she was unnatural and unloving and preferred hirelings to her husband; when the plaintiff told him he could not do what the nurse was called upon to do, he said that was not true, and that she did not love him as a wife should. That such language was most unjust and cruel, and made the plaintiff feel badly and retarded her recovery.

318 That the defendant continued from time to time abusive talk and scolding, and found fault with the nurse, and rudely and unkindly contradicted the plaintiff and the nurse in the plaintiff's presence as to the care and management of the child. That the acts and conduct of the defendant after the birth of the child so worried and affected the plaintiff that in consequence thereof, about January 25th, 1890, she had a nervous chill; and again on January 27th, 1890, she had another nervous chill, and was so sick that the doctor had to be called in to treat her.

That on or about January 28th, 1890, the plaintiff was not yet recovered in health, and it was thought possible she might have to have a surgical operation performed, and she said to the defendant that if it were necessary she would prefer to have it done by a physician in New York, naming him, who was a friend of her family, and whom she knew and trusted, instead of any physician in Louisville, a stranger to her. At time the defendant became very angry and abusive to plaintiff, and among other things angrily and insultingly said to her that she was unnatural as a wife, false as a woman, and shamefully heedless of his wishes; that he angrily paced up and down the room, shook his fist at the plaintiff, and was very violent in his manner. That such language and conduct was most unjust and cruel, and in consequence thereof the plaintiff was greatly frightened and feared he would do her bodily injury, and became and was hysterical and greatly exhausted, and the regaining of her health and strength was greatly retarded.

That about March 15th, 1890, the plaintiff, with the child and nurse and the plaintiff's sister, went to Louisville, and there joined the defendant at his parents' home.

319 That on or about March 21st, 1890, at their home in Louisville, in the presence of the plaintiff's sister, without any cause or reason therefor, the defendant began to talk to the plaintiff about money, and became greatly excited and angry, and said, among other things, to the plaintiff that he would publish her in all the stores; that he would not pay any bill for her; that she was not fit to take care of her child; that she was a dirty nigger, and ought to be ashamed of herself. The plaintiff's sister, who had been in-

vited to visit them, said to him he ought to be ashamed to talk so, whereupon he began to abuse her, and, among other things, told her if she were a man he would throw her out of the window; that she had no business in that house, and was no lady; that such language was most unjust and cruel and uncalled for, and both the plaintiff and her sister were greatly frightened at his language and violent conduct, and were fearful he might use violence to them and do them bodily harm; that later, on the said 21st day of March, 1890, at their said home in Louisville, the said defendant and his father, the said John M. Atherton, went to the room of the plaintiff, and the said John M. Atherton said to the plaintiff, among other things, in the presence of the defendant, and with his apparent approval, that he had come to hear what the plaintiff had to say, and be a witness for his son, the said defendant; that the plaintiff was a nice kind wife, and used other insulting expressions when the plaintiff and her sister left the room and went into another room; the defendant and his father followed her into the other room, and the father of the defendant, with the apparent consent and approval of the defendant, and in the presence of the plaintiff's sister, said, among other things, to the plaintiff that he would turn her,
320 a disgraced woman, into the street; that he would take her child away from her and keep it; that the plaintiff was a nasty woman and not fit to take care of her child, and they would take it away, and falsely charged that she had accused his son of an unnatural crime; the plaintiff told him she did not know what he meant, and denied she had accused his son of anything wrong; whereupon he said in the presence of the defendant, and with his apparent approval, that the plaintiff, anyway, was a dirty thing, and did not love her husband, and was jealous and mean, and that he would turn her out of the house and take away from her her child; that thereupon the plaintiff said she would not listen to such talk, and started towards the door to leave the room, when the said defendant roughly seized her and pulled her back and said, "Damn you, you shan't go; you shall listen;" that in so seizing the plaintiff the said defendant hurt the plaintiff, and the plaintiff was greatly frightened and feared that the defendant would do her serious bodily harm; that the defendant and his father remained there for some time after and continued and repeated such abusive language.

That such language and abuse was most unjust and cruel, and greatly frightened the said plaintiff and caused her to weep violently and to feel exhausted, and prevented her from sleeping that night, and caused her to go into hysterics, and made her sick, and she did not recover from the effects thereof for some time.

That in April, 1890, and about the 18th, at their said home in Louisville, the said defendant, without any just cause or reason, became angry with the plaintiff and found fault with her dressing, and among other things said the plaintiff was slovenly and repulsive, a dirty slouch and a nasty nigger, and not fit to touch, and that she was worse than a nigger wench.

321 That about April 23rd, 1890, at their home in Louisville, when the plaintiff was sick, the said defendant expressed dis-

gust at her condition, and said, among other things, that she was a nasty cat, dropping offal about, and was a disgusting, dirty creature; that all of such language was most unjust and cruel, and greatly wounded the feelings and injured the health of the plaintiff.

That on or about May 6th the sister of the plaintiff was about to return home, and the plaintiff and the said defendant took her to the depot at Louisville to take the car; that the defendant, without any cause or reason, told the sister of the plaintiff that she was a hypocrite, and when she was about to start pushed the plaintiff towards the railway train and said, among other things, that she had better go with her sister, as nobody wanted her, the plaintiff, in Louisville; that the plaintiff said to him, referring to their child, that he knew what was at the house, and the defendant said if the baby was all she thought of she had better clear out, as he did not want her.

At that time, and frequently during the month of May, 1890, the said defendant, at their home in Louisville, called the plaintiff a liar.

That during the month of May, 1890, and afterwards, the fits of temper of the defendant grew more frequent, and he frequently threatened the said plaintiff to divorce her, and said that the baby was the only tie between them, and that he would take it and leave the plaintiff. At one time in the month of May, 1890, at their home in said Louisville, he reproached the plaintiff for looking sad when their child was ill, and said, among other things, that the plaintiff had so disagreeable a face, and looked so glum, that he could
322 not bear to look at her; that she had no right to look as she did, even though the child was sick.

At another time, in May, 1890, at their home in Louisville, he ordered the plaintiff about and spoke insultingly to her when the plaintiff told him she would not think he would speak so to her, whereupon the defendant replied that things had come to a pretty pass if a man could not wollop his own jackass.

The plaintiff's sister was to be married in the summer of 1890, and the defendant promised such sister that he would take the plaintiff to her wedding; afterwards, and in June, 1890, he said among other things to the plaintiff that she should not go, or if she did go she should not take the baby and should not come back; that her family had insulted him by objecting to his treatment of her when the child was born, and that she should never take the child to them; that they were vile and miserable and that plaintiff had no love for him or she would hate her family as he did.

That during the summer of 1890 the defendant was in Saratoga; the child of the plaintiff became unwell and the plaintiff and the child, in June, 1890, were taken to Cresson, Pennsylvania; that a few days thereafter the defendant joined the plaintiff there; that — said Cresson, in June, 1890, the said defendant on several occasions, without any just cause or provocation, became very angry and scolded and abused the plaintiff and frightened her so that she was constantly in fear that he would strike her; that he shook his fist at her, and said that she was a dirty nigger, and repeated his threats theretofore made that he would divorce her; that such talks and

threats were so loud and violent that the guests in the hotel heard him, and the plaintiff was greatly humiliated thereby; that
323 on several occasions at said Cresson, in June, 1890, among other things, he said to the plaintiff that she was a false wife and had no respect or love for him or she would not want to go to her sister's wedding or to her family, who were vile and low-lived, and that he would divorce her and disgrace her; that the plaintiff asked him for what reason he would divorce her, and he said that she was a nasty thing and an indecent woman, and was not fit to have her child with her.

That in September, 1890, the plaintiff and her child were at Clinton, and started with the defendant to return home to Louisville; that the plaintiff had a nurse for the said child, which she intended to take to Louisville, to care for the child upon the journey; that the defendant at first consented thereto, but suddenly in New York he got in a great passion and dismissed the nurse and said to the plaintiff, among other things, that she had got the nurse for a spy and only wanted her for that purpose; that the plaintiff urged him to let her stay and go with them to Louisville to take care of the child, as it was hard for her to do so on the journey; whereupon the defendant said among other things that the plaintiff was a bad mother, lazy and useless, and should take care of the child alone; that she had got the nurse as a spy and that she should not stay.

That after the plaintiff and defendant returned to Louisville and in November and December, 1890, at their home in Louisville, the said defendant on several occasions, without any reason or provocation therefor, became very angry and seemed almost insane with rage at the plaintiff and said to her among other things that she did not love him, that she was only his mistress and that she was
324 no wife, and that he never asked her to marry him, but that she ran after him, and that she was nothing but a common woman; and he was so violent in his manner and language that she was in great fear that he would do her bodily injury. That the father of the plaintiff died in the month of March, 1891, and the plaintiff was in Clinton and remained with her mother, with the consent of the defendant, until May, 1891, when she returned to the defendant at Louisville; that after their return to Louisville, and in the month of June, 1891, the defendant renewed his threats of getting a divorce, and said among other things to the plaintiff that she could go home, but that she must not take her child; that he did not care what she did or where she went, but that he would keep her child and she should never have her any more. That on one occasion on or about June 13, 1891, at their said home in Louisville, the said defendant and his father came to the plaintiff and ordered her to listen; that defendant then said among other things, in the presence of his father, that they had come to tell her that they were going to take away her child; that she was not fit to have her and was a bad woman and unfit to have a child; that they were going to turn her off; that the said father, on that occasion, among other things said to the plaintiff, in the presence of the defendant, that if she was his wife he would file a plea for divorce

on that day; that he would not live with her another hour; that they would take away her child and turn her out and prevent her from ever seeing her child.

The plaintiff said to them that she did not think they could take away her child; whereupon they said that she would find out that they could and that the law would allow them to do so, and that she better consult a lawyer if she did not believe them. The defendant said that they would give her a day to decide if she
325 wanted to go home quietly and leave the child; that he did not care how soon she went, but that she should not take the child out of the house. That the said defendant and his father were very violent in their manner and language and greatly frightened the said plaintiff, and she feared that they intended to attempt to take her child from her and never allow her to see it again. That on another occasion and about June 14, 1891, at their home in Louisville, the said defendant said to the plaintiff, among other things, that he should proceed to divorce her in the autumn and would make his arrangements for that; that plaintiff said to him that if he meant to do that to begin it then and not wait till autumn; that she did not want it hanging over her all summer; that it would torture her. The defendant replied among other things, that she ought to be tortured as much as a man could, and that he would torture her; that an indecent woman like her ought to suffer; that the plaintiff in June, 1891, came to Clinton with her child to visit her mother and remained there until September, when the plaintiff received a letter from the defendant asking her to return to Louisville, and also a letter from his mother asking her to return, and promising that the defendant would be kind to her, and that she should suffer no more from his abuse; that thereupon, and in September, 1891, the said plaintiff, with her child, returned to Louisville; that after her return to Louisville the said defendant treated the plaintiff rudely and with great disrespect before his family and servants. On or about October 2nd, 1891, at their home in Louisville, the said defendant, without any cause or reason, became very angry with the plaintiff, and among other things said to her that he was going to cut her allowance down; that he would not pay
326 any bills she would make; that he wished the baby well dressed, and that he would pay the bills made for the baby, but that he did not care whether the plaintiff had dresses or not; that the plaintiff remonstrated with him, and said to him that she thought he would wish her to dress suitable to her position; that the defendant said in reply that he did not care what she wore, and that she could wear her nightdress in the street for all of him; that she had pretended to spend money for the baby, but had spent it for herself, and had sent it to her family, and that he would not stand it any longer. The plaintiff says that it was not true that she sent money of his to her family, and she so informed the defendant.

That on or about October 3rd, 1891, at their home in Louisville, the said defendant, without any just cause or provocation, became very angry with the plaintiff, and said to her among other things, that the food she provided for the child was not fit for a pig to eat;

that she knew nothing about the care of a child, and was not fit to have her; that the court should decide that if a woman as foul as she was should keep a child; that he had made arrangements to take the child away from her, and that she should never see her again; that she was not fit to keep her; that ther-upon the said defendant seized and tore the child from the arms of the plaintiff, and violently took hold of the plaintiff and pushed her through the door and out of the room, injuring her arm and shoulder, and locked the door against the plaintiff; he ordered the nurse to pick up the baby's clothing and get ready her hat and cloak as he intended to take her away; the plaintiff was greatly frightened at his violence and language, and feared that he would do her great bodily injury, and would take her child from her, and went to the defendant's mother;
327 the defendant followed her and was very angry, and said among other things, in the presence of his mother, that the plaintiff was foul-mouthed, and that she was not fit to keep the baby and was worse than a nigger; the plaintiff went up to the defendant and put her hand upon his arm and begged him to live in peace with her, and treat her as well as a wife should be treated; that the defendant roughly flung her from him and said no, he would as soon touch a snake; that the plaintiff became and was greatly frightened by the great anger of the defendant, and his violent language and manner, and greatly feared he would do her great bodily harm, and take from her her child and forever keep it from her; and after the defendant had left the room, the plaintiff took her child in her arms and secretly fled from the house and sought safety and refuge with a friend in Louisville.

That soon after, when the defendant learned where the plaintiff was, he went to her and angrily ordered her to return to his father's house; the plaintiff said to him she would go back if he would promise her and give her assurance that he would cease his abuse and treat her well and as a wife should be treated; that the defendant refused to make any such promise or to give her any such assurance, but angrily said to the plaintiff, "Damn your assurance; I will give you one more chance to be a decent woman; if you don't come back in two hours I will send the sheriff after you and have you dragged back in disgrace," or words to that effect.

That by reason of the violent temper of the defendant, and of his giving way to the same, and by reason of the violent abuse, threats, acts and conduct of the said defendant towards the plaintiff, and of his cruel and inhuman treatment of her, as hereinbefore set forth,
328 and of his refusal to promise or to give her any assurance that he would treat her well, the said plaintiff was greatly frightened and afraid of the defendant, and feared that if she returned to him he would do her bodily injury, and take and separate from her her child, and she did not dare to return, and refused to return to him or to the home of his parents, and that she since has not dared to return to the defendant and live with him.

That in a few days thereafter the said plaintiff, with her child, went to said Clinton to her mother, where she and the child have since resided and do now resided.

That in addition to the foregoing specified threats, language, acts and conduct of the said defendant, the said defendant on divers other occasions at Louisville and in Clinton and at *at* divers other times, without any just reason, cause or provocation, became violently angry with the plaintiff, and angrily and violently threatened her, and applied to her low, mean, disreputable and disgraceful names and epithets, and falsely accused her of disgraceful and disreputable acts and conduct, which greatly distressed and frightened the said plaintiff.

That by reason of the said violent abuse, acts, threats and conduct of the said defendant hereinbefore set forth and alleged, the said plaintiff became and was greatly distressed in body and mind, and became and was greatly afraid of the defendant and fearful that he would do her bodily injury, and her nervous system was seriously shocked and affected, and she became and was extremely nervous and oftentimes unable to sleep, and suffered great pain and anguish of body and mind, and her health became and was greatly impaired, and at times she became and was sick, so that she required and had the attendance of physicians, and that she has not
329 yet entirely recovered from the effect of such treatment of the defendant.

That each and every one of the acts hereinbefore set forth as having been done, committed or permitted by the defendant towards or in relation to the said plaintiff, and his abuse, violence, and threats and conduct of and towards the plaintiff, as hereinbefore set forth, were and each of them was wholly without any just reason, cause, or provocation on the part of the said plaintiff. That the said plaintiff always and at all times was a good, faithful wife and careful and a loving mother, and as such fully discharged all her duties towards the said defendant and her said child.

That said plaintiff further alleges upon *the* information and belief, that the said defendant is the owner of and is possessed of property to a considerable amount, and was and is abundantly able to support and maintain the plaintiff and her child.

Wherefore the said plaintiff demands judgment in this action against the said defendant.

That the plaintiff be separated from the bed and board of the defendant.

That the plaintiff have the custody, care, and education of the said child of the plaintiff and defendant.

That the defendant be required and compelled to provide suitably for the support of the plaintiff, and for the maintenance and education of the said child of the plaintiff and defendant; and that the said defendant be required and compelled to give security therefor.

That the plaintiff recover of the defendant the costs of this action.

330 And that the plaintiff have such other or further judgment or relief as to the court shall seem just and equitable to grant.

W. & N. E. KERNAN,
Plaintiff's Attorneys, Devereux Block, Utica, N. Y.

STATE OF NEW YORK, } ss:
County of Oneida, }

Mary G. Atherton, being duly sworn, deposes and says that she is the plaintiff in this action; that she has heard read the foregoing complaint and knows the contents thereof; that the same is true to the knowledge of deponent, except as to the matters therein stated to be alleged on information and belief, and as to those matters she believes it to be true.

MARY G. ATHERTON.

Sworn to before me this 11th day of January, 1893.

J. FRANK ROGERS,
Notary Public in and for Oneida Co., N. Y.

Supreme Court, Oneida County.

MARY G. ATHERTON
against
PETER LEE ATHERTON. } Answer.

Peter Lee Atherton, defendant in this action, as answer to the complaint herein, admits:

That on the 17th day of October, 1888, at Clinton, in the
331 county of Oneida, State of New York, the said plaintiff and defendant were married and became husband and wife.

That at the time of the said marriage the said plaintiff was a resident of the State of New York, and the said defendant was a resident of Louisville, in the State of Kentucky.

That after the said marriage the said plaintiff and defendant resided in said Louisville, in the home of the father and mother of the said defendant, Mr. and Mrs. John M. Atherton, which was also the home of said plaintiff and this defendant, and continued to reside there until the plaintiff left the defendant, as hereinafter stated.

That on the 8th day of January, 1890, a child was born of the said marriage to the said plaintiff and defendant, being a daughter, and which child was named Mary V. Atherton; and that said child is now in the possession of and is being physically cared for by said plaintiff, its mother.

That the said plaintiff, in the month of October, 1891, left the said defendant and ceased to live with him as his wife; and at the time of the commencement of this action the plaintiff was in the State of New York, and at said Clinton in said State; that the said defendant has continued to reside, and now resides, at Louisville, in the State of Kentucky, and is a resident of said State of Kentucky.

That in the month of July, 1889, the said plaintiff, with the consent of the defendant, was at her parents' home in Clinton, and accidentally fell; that the defendant came to Clinton and re-
332 mained a few days, but left while the plaintiff was still confined to her bed by reason of such fall.

That about the first week in October, (and not about September 26, 1889, as the defendant recollects,) the plaintiff and defendant returned to their home in Louisville; and about November 1st, (and not November 19th, 1889, as defendant recollects,) with the consent of the defendant, the plaintiff went to her parents' home in Clinton to remain with them through her expected confinement; and that about January 3rd, 1890, and about a week before the birth of the child, the defendant came to Clinton, to the home of plaintiff's parents, where the plaintiff was.

That the plaintiff's aunt was sick in the next room to that occupied by the plaintiff and defendant.

That the plaintiff's child was born January 8th, 1890.

That the defendant found fault with the nurse; if, by finding fault is meant properly criticising.

That about January 25th, 1890, the plaintiff had a nervous chill, and was so sick that the doctor had to be called in to treat her.

That on or about January 28th, 1890, the plaintiff was not yet recovered in health, and it was thought possible that she might have to have a surgical operation performed; and she said to defendant that if it were necessary she would prefer to have it done by a physician in New York city, (naming him,) who was a friend of her family, and whom she knew and trusted, instead of any physician in Louisville, a stranger to her.

That some time in the month of March, 1890, the plaintiff, with the child and nurse and the plaintiff's sister, went to Louisville, the defendant meeting them in Cincinnati, and going with them down to Louisville.

333 That in the latter part of March, 1890, (defendant is not prepared to admit that it was the 21st,) at their home in Louisville, the father of the defendant, the said John M. Atherton, went to the room of the plaintiff, the said defendant being present; that the plaintiff and her sister left the room and went into another room; that the defendant and his father followed her into the other room; that the defendant and his father remained there for some time after.

That some time in May, 1890, on the occasion of the return of the sister of the plaintiff to New York, the plaintiff and the said defendant took her to the depot at Louisville to take the cars.

That at one time, (defendant is not prepared to admit that this was in the month of May, 1890, and it may have been more than one time,) at their home in said Louisville, this defendant did remonstrate with (not reproach) the plaintiff for looking sad or out of humor when their child was ill, and did say that she ought not to look as she did, even though the child was sick.

That at some time, (defendant is not prepared to admit whether this was in May, 1890,) at their home in Louisville, this defendant did use (but in the course of a bantering conversation, in a pleasant and jocose way) the expression quoted in the complaint, that "things had come to a pretty pass," etc.

That the plaintiff's sister was to be married in the summer of 1890, and the said defendant promised such sister that he would

take the plaintiff to her wedding; that afterwards and in June, 1890, he said, among other things, to the plaintiff that if she went to Clinton to her sister's wedding she should not take the baby; that defendant did say to her that her father had insulted him.

334 That during the summer of 1890 the defendant was in Saratoga, and the child of the plaintiff and defendant became slightly unwell, and the plaintiff and the child, in June 1890, were taken to Cresson, Pennsylvania.

That in September, 1890, the plaintiff and her child were at Clinton; that the plaintiff had a nurse for the said child; that the defendant dismissed the nurse in New York city; that the plaintiff urged him to let her stay and go with them to Louisville to take care of the child, as it was hard for her to do so on the journey.

That the father of the plaintiff died, he believes, in the month of March, 1891, and the plaintiff was in Clinton—not at the time he died, but subsequently—and remained with her mother, with the consent of the defendant, until May, 1891, when she returned to her home at Louisville, defendant meeting her at Cincinnati.

That on one occasion, (defendant is not prepared to say whether it was on or about June 13th, 1891, but in that month,) at their said home in Louisville, the father of defendant, among other things, said to the plaintiff, in the presence of defendant, that if she were his wife he would, if a court would grant it, file a plea for divorce on that date.

That the plaintiff, in June, 1891, or about that time, came to Clinton with her child to visit her mother, and remained there until September, and that at that time she did receive a letter from the defendant asking her to return to Louisville, this being one of the letters of a regular correspondence carried on during the summer, and this particular letter informing the plaintiff that the weather was such in Louisville as that it was safe for the child to return.

335 That on September 26th, 1891, the said plaintiff, with her child, returned to Louisville.

That on October 3d, 1891, the plaintiff took the child and secretly fled with it from the house.

That he is the owner of property, and was and is abundantly able to support and maintain the plaintiff and the child.

The defendant, for further answer, denies each and every allegation of the complaint herein, except as hereinbefore admitted or answered unto.

The defendant, by way of further answer, says that at the time of the marriage the defendant had been quite sick, and was still quite unwell, and after the marriage he and the plaintiff went to New York city, and, defendant being still unwell, went thence to Old Point Comfort on their bridal trip. That after they had been there a short time, the plaintiff became restless and dissatisfied, and, with the consent of the defendant, went to New York city to see her mother and aunt to be gone two days, but remained four or five days; at the end of which time, at defendant's suggestion, she came from New York with defendant's father to Charlottesville, Va., and there met the defendant, and they came on to Louisville together.

This conduct of the plaintiff to defendant evidenced a want of affection on the part of the plaintiff to defendant, and greatly wounded and annoyed him; and after their return home, perhaps in the month of January, 1889, he did say to the plaintiff that if she had remained contentedly longer with him at Old Point Comfort he would have been better, and did refer to the want of affection
336 showed to him by her conduct in that matter, and its affect on him in worrying him while sick and wounding his sensibilities.

Some time in February, 1889, the plaintiff and defendant went South on a trip, and were, during the trip, at Pensacola, Fla.; Thomasville, Ga.; Pass Christian, Miss., and New Orleans, La. While at Pensacola the plaintiff mentioned to defendant her wish to return to her home in Clinton, N. Y., for a visit during the coming summer, and expressed the wish that defendant would go with her. The defendant made no objection to her going, but said that by reason of the feeling which the plaintiff's mother and aunt, Miss Goodenow, must have *have* for him (his knowledge of which was based on what plaintiff had told him her mother and aunt had said about him before the marriage, and since), that he doubted whether he would go to Clinton, as long as such feelings existed; at Thomasville, Ga., where this matter was referred to, the plaintiff told defendant that the reason for her mother's feelings towards him was that in Saratoga, N. Y., the summer before the marriage, she, plaintiff, and her mother had observed the defendant's conduct towards his mother; that defendant had on one occasion come into his mother's room where she was a confirmed invalid, and had laid down on the bed by her, and had put his head on her shoulder; that this had shocked both the plaintiff and her mother extremely; and the plaintiff made comments and indicated that her mother had made comments that were extremely disagreeable and almost intolerable, which resulted in defendant making most earnest, and perhaps angry protests against such a state of feeling; the plaintiff then said that she would no longer feel about it as she had
337 done, and would never refer to the matter again; while on this trip the plaintiff and defendant were joined by defendant's father, and plaintiff was, without any cause, very cool, indeed rude, to the defendant's father, and he finally left them; about April, while they were still in the South, the defendant having agreed that he would go to Clinton with the plaintiff in the following summer, it was ascertained that the father and sister of the plaintiff intended to go to Europe the coming summer, and the proposition was made by the plaintiff, and the agreement finally completed by correspondence with plaintiff's father, that the defendant should take the house of the father and mother of plaintiff, for the months of July and August, not paying any rent, but assuming all the expenses of living, paying servant hire, and keeping up the place generally; it was understood that the plaintiff would go the latter part of May, that the defendant would take her there, remain a few days and then come back, and join her there somewhere in the early part of July, and remain there for the two months;

after the return to Louisville, and in the early part of May, 1889, the physician of the defendant, having examined him, made a very unfavorable report as to his condition, indicating that serious trouble might be impending, and that he might be in the incipient stages of Bright's disease; the defendant's father saw an analysis made by the physician, and explained the serious character of it to the plaintiff, with the suggestion that the defendant's health was such that he ought not to undergo a change of climate and surroundings by the trip to Clinton just at that time; that night, in their room, the plaintiff exhibited much ill humor toward defendant, expressing great disappointment that he was not to take her to Clinton, and saying that his health was such that he was
338 never able to do anything that she wanted done; no reference was made by her to the serious condition that defendant was threatened with, nor any apprehension on her part, nor sympathy with him, expressed; defendant's feelings were injured and wounded by this method of approaching the subject, and he so told plaintiff, and said that in future he would never say a word to her about his health, nor should any one with his knowledge or consent; the plaintiff thereupon expressed herself as very much aggrieved and injured, and afterwards became hysterical.

That defendant took out or brandished a loaded pistol at that or any other time, or threatened the plaintiff with it, or exercised or threatened towards the plaintiff any personal violence, is entirely untrue.

In regard to what is said about an intercepted letter, it is true that while the plaintiff and defendant were in the South the defendant's mother did open a letter which came to the house addressed to the plaintiff; this was done entirely by accident; the letter was handed by a servant to the defendant's mother, who was lying sick in a darkened room with only a little light coming in at one shutter, with the statement from the servant that it was for her, the defendant's mother; opening it, the defendant's mother read a part of the letter, still thinking it was for her; discovering her mistake, the letter was put away; it was not handed to the plaintiff when she returned, because its tone was an unfriendly one towards the defendant and his family, and the defendant's father and mother believed that the disposition of the plaintiff was suspicious and jealous, and that there had been some friction between the plaintiff and defendant, and that this was in a considerable measure caused by communications from the family of the plaintiff, to which
339 she had referred, and, in consequence, it was believed by defendant's father and mother, without communication with him, that the wise thing to do was to say nothing about the letter at all, at that time; the plaintiff found out there was such a letter by reading a letter which some time afterwards the defendant's mother wrote to him, and perhaps by some reference made by defendant's father to plaintiff, of the fact that he did not believe her mother gave her good advice; the defendant never threatened either the plaintiff or her mother with the publication of the letter, nor did his mother ever so threaten; the defendant may have said that

the letter was of such a character that if generally known would not be creditable to her mother; and so the defendant now believes.

About May 20th, 1889, the plaintiff went to Clinton, with the consent of the defendant, so as to see her father and sister before they sailed for Europe, and in pursuance of the arrangement heretofore detailed, under which the plaintiff and defendant were to take the house of the plaintiff's father and mother for the months of July and August; the defendant and his father went for defendant's health to Manitou Springs, Colorado; while in the West, letters were written by the plaintiff to defendant, referring to his health, and saying that she had been deceived as to the condition of his health at the time they were married; the defendant, being greatly distressed and outraged by this, in his sick condition, wrote to plaintiff, asking her specifically and directly whether or not she meant to say that she believed any deception or fraud had been purposely employed by this defendant or by any of his friends, in order to obtain her consent or the consent of her parents to their marriage.

When defendant reached Chicago returning from the West,
340 he received a letter from plaintiff answering the above question in the affirmative. Replying to this the defendant, being still more distressed and outraged, said to the plaintiff that if their marriage had been obtained by fraud, falsehood, or deception, it was not binding morally, and ought not to be binding legally; that he had great reluctance to believe that such a charge originated with her, and he requested her to telegraph him at once on receipt of the letter what time she would meet him at Utica, and to go from there to some place near by, as he wished to have an interview with her alone and find out, in person, exactly what her own feelings were on this point before he went to Clinton. During this correspondence the defendant received letters from the plaintiff's mother which were very disagreeable, unjust, and offensive to him. While in Chicago the defendant received information that his mother was very dangerously ill at Saratoga (where she had been taken to a sanitarium for her health), and that if there was a recurring attack of angina pectoris, which was feared, that it might be her last. The defendant telegraphed plaintiff that he would leave that day for Saratoga, and this telegram crossed one from plaintiff to defendant, saying that she would meet him at Utica. The following morning, at Syracuse, N. Y., defendant, while on the train, received a telegram from plaintiff's mother, Mrs. Kelsey, saying that plaintiff had had a fall, which, under the circumstances, threatened serious results, the plaintiff being then with child. This fact of the plaintiff's condition, while suspected by her before she left Louisville, had not been communicated to defendant as a certainty until it was communicated by letter to him after she had gone to Clinton. Defendant, although he feared that he was going to the death-bed of his mother, left the

train at Utica and drove over in a wagon to Clinton. He re-
341 mained there two or three days, and finding that there was no danger to the plaintiff, he went to Saratoga, remaining five or six days, until his mother was slightly better, when he returned to Clinton, and, with the exception of probably ten days taken up in

two or three visits which he made during the summer to his sick mother at Saratoga, defendant was in Clinton continually from that time until the latter part of September. During the time from about the 20th of July to about the middle of September, the defendant maintained the establishment at Clinton, and, with the exception of probably ten days or two weeks, there remained with him and the plaintiff, as their guests, the plaintiff's mother and brother. Under the circumstances, the condition of the plaintiff being as it was, complicated by her having had the fall, the defendant passed over his determination to insist upon an explanation of the charges of fraud and deception. The defendant did not speak to the plaintiff in any way disrespectfully of her father at this time. He did at one, or perhaps more times, when the plaintiff would complain to him of the exacting character of his business and the attention he paid to it when he was able to work, say to her that his manner of life was different from that of her father; that her father, being a college professor, was able to lay out his plans for the year and to conform to them; that his business was not exacting; that on the contrary, where a man was engaged in active commercial pursuits he was unable to command his own time; that to make a living and support his family, and especially to attempt to support them in comfort and luxury, he had to make almost everything, except consideration for health of himself and family, secondary to the requirements of business. On one occasion in Louisville in
342 1890, he did refer to the plaintiff's father as a cur; not meaning, however, for the plaintiff to hear him. This was on account of a very gross insult which the plaintiff's father put upon this defendant, and under very great provocation and anger; and this defendant apologized afterwards to the plaintiff for having used the expression.

The defendant has said to plaintiff at times that he was confident that her mother had given her advice which no mother ought to have given her daughter; and so the defendant believes. There was one occasion during this period, in which plaintiff said to defendant that he ought not to have written a certain letter to plaintiff's mother; that he ought to have been kicked out of the house for writing such a letter, and if her father had been at home when the letter was received it would have been done. This was overlooked by him, because of her mother's explanation and request, and the defendant, although he had threatened to leave Clinton and never spend another night there because of this insult, remained.

When the father of the plaintiff and her sister returned from Europe, they expressed themselves pleased at the way in which the defendant kept up the place and had prepared a welcome for them on their return.

In the latter part of September, 1889, the defendant went to Saratoga, and while there decided to at once return to Louisville. The plaintiff and her sister came over to Saratoga to visit defendant's mother, the plaintiff's sister returning to Clinton, and plaintiff and defendant going to New York and thence to Louisville, and reaching Louisville in the early part of October, 1889. About two weeks

subsequent to that, the defendant left Louisville to go East on
343 business, and from there to Saratoga to bring his mother home; he expected to be gone about two weeks; not longer; while he was away, the plaintiff telegraphed to him that she intended to go back to Clinton; there had been a discussion between the plaintiff and defendant as to whether she should be confined in Louisville, or return to Clinton, the defendant preferring her to remain in Louisville, and suggesting that her mother should come out and stay with her, but saying that he would consent for her to return to Clinton if she insisted on it, as he did not want her to go through this ordeal anywhere that she was not satisfied to be. Several telegrams passed back and forth between the plaintiff and defendant, and at last she telegraphed him that she was going to leave, and the defendant telegraphed her that he would meet her at Utica. Before leaving Louisville the plaintiff, without the knowledge of defendant, had a furniture dealer to send to the house and get all of her furniture, with some slight exceptions, and her personal belongings, with some few exceptions, and pack them up, and they were shipped to Clinton, and were never returned to Louisville. Plaintiff left Louisville, as defendant recollects, within the first few days of November, and he met her at Utica, and went with her to Clinton. Defendant spent the months of November and December in the East looking after his business, which was quite large in Boston, and New England generally, and in the State of New York; going to Clinton at Thanksgiving, and probably once in December between Thanksgiving and Christmas. Soon after Thanksgiving, the plaintiff went with defendant to Saratoga, N. Y., to see defendant's mother, who was still there and quite sick. Shortly before Christmas defendant came home, and soon after the first of January returned to
344 Clinton, as the time was approaching for plaintiff's confinement.

When defendant reached Clinton he found the house of Mr. and Mrs. Kelsey, where the plaintiff was, quite crowded; there being one young man of twenty and another of thirteen or fourteen, as guests, and the plaintiff in a small room in the third story. The defendant did express to the plaintiff his belief that her quarters were quite narrow—not as a complaint of his own discomfort, but of hers; and also said that to have the house so full, at such a time as that, was not respectful to the plaintiff, as it resulted, especially with the young men being there, in confining her more closely than she should have been. He did also express discontent when it was proposed that his wife, the plaintiff, should be put in a front room on the second floor, and that he should be put in an entirely separated room; not that the room to be assigned to him was not comfortable, but that it was too far away from his wife to enable him to give her that comfort, assistance and companionship that he desired to give her, and which he supposed she would like under the circumstances.

As for finding fault with the nurse, he did not criticise the nurse's management of the child at all, but he did criticise the nurse's untidy habits, so far as the plaintiff's room was concerned, and her unskillful and neglected conduct in reference to the temperature of

the plaintiff's room, and her general comfort; and these criticisms this defendant says were just, and were in the interest of the plaintiff and on account of his affection for her.

In response to that paragraph of the plaintiff's complaint in which it is alleged that when the child was only three days old the
345 defendant insisted he would stay in the plaintiff's room during the night, the defendant says, that the said paragraph is not true. He says that it is true that he did spend the night with his wife a few nights after the birth of the child; that this was at his wife's invitation; that she was very nervous, and said that if he would remain with her for a while she would probably become more quiet and go to sleep; that he laid down by her, and spent most of the night in the room, soothing her and quieting her; and the defendant says that his wife's request, and his compliance with it, were both perfectly natural, under the circumstances, and if there be any covert suggestion of impropriety in the complaint, in reference to this matter, this defendant says that the same is entirely untrue.

During the birth of the child the plaintiff was injured; this was not discovered immediately; when discovered the physician who had attended her at the moment of the child's birth had become too sick to further attend her, and another physician had been called in; this physician, with another, said that nothing could be done at the time in the nature of an operation, that probably no operation would be necessary at all, and, if necessary, could not be made safely until May; the plaintiff, in talking of this matter, expressed the desire to have the operation performed, if at all, by a friend of hers in New York city; to this physician the defendant had and made no objection whatever; he did, however, object to the plaintiff's remaining in Clinton that long, and did express the desire that she should come back home when she was well enough to travel; that if it turned out that the operation was necessary, she should have it performed in Louisville, if it could be done there, but, if it could not be done there to her satisfaction, he would then take her to New York; that the question between the plain-
346 tiff and the defendant was not what physician should perform the operation, but whether the plaintiff should remain in Clinton so long a time on the uncertainty, or should come home with the child, and, if there was a necessity for any physician at all in the matter, and she was not content with one in Louisville, go to New York; it turned out that there was no occasion for any operation at all, and none was performed.

When the plaintiff, with her child and nurse and her sister, came to Louisville, the defendant met them in Cincinnati and brought them to their home in Louisville; not long after the plaintiff's return with her child and her sister to Louisville, a physician had to be called in to see the baby; the plaintiff insisted that while the physician was examining the baby defendant should go out of the room, because it was a girl, and not a boy; the defendant, recognizing in this a reference to views which she had expressed in regard to the relations between the defendant and his mother, said that he

would not submit to her laying down for him such rules of propriety in regard to his conduct towards his own baby; the plaintiff replied that her views and those of the defendant about the proprieties of life were very different, and to illustrate that she instanced that her father and all the servants on the place had said it was very strange that defendant should go into her room at night and occupy the same bed with her two or three nights after the child was born; the defendant did say that such an insinuation as that was horrible, and that she knew there was no ground for it, and if such insinuations continued to be made it would destroy all happiness of their married life and necessarily end the relations between them as man and wife; during this conversation, in which the defendant's feelings were very much outraged, and he was greatly incensed and
347 angered, and which was continued after plaintiff's sister was present, he told the plaintiff that he did not want her to make any bills nor go into any large expenditures for the present, and upon her replying in a contemptuous way, he, in his anger, said that a woman who talked to her husband as she did had no right to expect him to be liberal. In response to a threat of plaintiff then made, that she would go and make bills where she liked, he, being still in the incensed and angered state of feeling, did tell her that if she made bills against his direct wishes and anything he might say, and in contempt of him, that he would notify the shop-keepers that he would not pay her bills. Her sister interfered against defendant in the conversation, and there were no doubt angry expressions by all three; but defendant says it is untrue that there were upon his part any insulting expressions to the plaintiff or to her sister. Defendant thinks that his anger was but natural under the circumstances.

It was about this time that the defendant's father, overhearing some of the conversation, and surmising that there was some serious misunderstanding between the plaintiff and defendant, came upstairs, and, meeting defendant in the hall, asked defendant to go with him to see plaintiff, and they went together into plaintiff's room. The defendant's father then said that he had never before spoken to plaintiff about their troubles, or interfered at all between plaintiff and defendant; that he had never talked to her about it at all, but that now he felt that he would not be doing his duty if he did not talk to both of them, as he felt a deep interest in their happiness and future. The father of the defendant then attempted in a calm, earnest and affectionate way to have a conversation with the plaintiff and defendant, and the plaintiff's sister com-
348 ing in, requested her to withdraw. This she refused to do. There was a considerable amount of conversation, particularly on the part of the defendant's father, the plaintiff and the defendant saying but little. The defendant's father was earnest, but calm and kindly, and argued and expostulated, but was in no way insulting, used no rude language, nor were there any oaths or improper language employed by either the defendant or his father. The interview, however, seemed productive of no good result, and the defendant and his father left the room together. Subsequently in that day defendant received a message from his wife at his office,

by telephone, asking him to come back home from the office; and, believing that he could do no good if he did do so, he asked his father to go instead. When he came home at dinner he found that his wife had become quiet, and matters were very pleasant again not only with her, but with her sister. That evening, when defendant returned home again to supper from his business, he found, shortly after tea, that his wife was in hysterics from anger. At the solicitation of her sister he went upstairs and endeavored to calm her, saying he would not stay with her if she was not quiet, or if she endeavored to go over the morning conversation or any matters of difference. On the next morning she expressed to him her regret of the scene of the day before, and asked that he would forget it. In this whole matter neither the defendant nor his father used any sort of violence toward the plaintiff, either in threat or act.

Within about twelve months from this date the plaintiff, from time to time, made bills for wearing apparel and other articles for herself, charging them to defendant, and defendant from time to time paid them, amounting to between fifteen hundred and two thousand dollars.

349 Shortly after this occurrence the plaintiff's father came from Clinton to Louisville, and came to the house of the defendant; while there, in conversation with defendant's father, plaintiff's father spoke of this defendant in a grossly insulting manner; the result of this was the assemblage into one room, of the plaintiff, the defendant, the plaintiff's father, and the defendant's father; what had been said by the plaintiff's father was repeated; it had reference to the first night that the defendant arrived at Clinton before the birth of the child; the plaintiff was then appealed to to say whether the accusations were just, and, in the presence of the company above named, said they were not; but the plaintiff's father declined to either retract or apologize, and, notwithstanding that he was subsequently written to by the plaintiff (or so she informed the defendant), he refused to make any explanation or apology at all; after plaintiff's father had gone away, matters were smoothed over; the plaintiff's sister remained a guest in the house, an entertainment was had in her honor, and she went on a trip with the defendant alone to New Orleans and Pass Christian, this being at the invitation and the expense of the defendant, and with plaintiff's approval, so that she might have an opportunity of seeing the South.

In regard to the charge that the defendant found fault with plaintiff's dressing, he denies that the charge is true as made; he states that it is true that he called the attention of the plaintiff to the fact that in a city like Louisville, where soft coal is used and where the air is full of soot, that she would have to make more frequent changes of garments that washed than in a clean place like Clinton, and that the expense of laundry was a matter that could not be considered, such changes being absolutely necessary on account of the conditions of the city.

350 When the sister of the plaintiff started to leave for home, plaintiff and defendant went with her to the depot to see her on the train; her sister was crying, but when defendant happened

to walk up to her she said that he must not think she was crying because she was going to leave him, that she was glad to get away from him, or words to that effect; on account of this, when she offered to give the defendant an affectionate good-bye, he replied that he did not see any use of this hypocrisy or foolishness—he does not recollect the exact words he used; but plaintiff's sister appearing to be aggrieved or injured at this, the matter was smoothed over, and, defendant supposed, forgotten.

After the occurrence with the plaintiff's father above detailed, and the failure on his part to offer any explanation or apology, the defendant told the plaintiff that as long as matters stayed as they were, he would not, and could not with self-respect, go to Clinton, or have anything to do with her family; and defendant said to plaintiff he did not wish her to take the child to Clinton while matters were in this condition, as, if she did, he could not go there to visit her. Before this the defendant had promised to take the plaintiff on to the wedding of her sister, which was to occur in the summer of 1890. After the occurrence above detailed, this defendant could not go to Clinton, and so told his wife. He did not refuse to allow her to go, but did object to her taking the child, as, if it got sick, he could not go and visit it. In the month of June, 1890, it was anticipated that plaintiff and defendant would spend the summer at a suburban resort near Louisville, but while defendant was away the weather became suddenly very hot in Kentucky, and it was decided that it would be better for plaintiff and the child to go to Cresson Springs, Pa. The defendant was in the East
351 and went to Cresson Springs, where he was joined not long afterward by his wife and child, his father bringing them on from Louisville. While there the news came of the death of the father of defendant's mother. Defendant took his mother home to Louisville, expecting to return to Cresson in a few days, it being agreed between him and plaintiff that plaintiff would remain there until he came back. In two or three days after defendant reached Louisville he received a telegram from plaintiff stating that she, with the child, had left Cresson for Clinton, saying that she had heard from Clinton that her mother was quite sick. She went to Clinton, taking the child, and remained there until the last few days in August or first of September, 1890. She then met the defendant in New York city, he going to New York from Louisville, and she bringing with her the child and nurse, and accompanied by her aunt, Miss Goodenow. This was the same nurse that plaintiff had brought with her to Louisville when she first brought the child there in March, 1890. She was not, according to defendant's belief, a suitable nurse, and in New York he did dismiss her, dismissing her there because she lived in the East. He gave her a month's wages and paid her way back to Boston. Her discharge was solely because she was impertinent, disagreeable, and this defendant was not satisfied with her as a nurse. The plaintiff and defendant returned to Louisville with the child about the 10th of September, 1890, and were in Louisville continuously from that time until on or about the 14th of February, 1891. During this period the plain-

tiff seemed to be more satisfied with her life, more interested in her home and home people, and happier generally than any time since she was married. There may have been some slight disa-
352 greements, some things of an unpleasant nature which happened, but there was no serious trouble. The plaintiff and defendant went together to many entertainments of various kinds, social, theatrical, and otherwise.

About February 14th, 1891, they went together South, to Pass Christian, Mississippi, remaining there for a few weeks, and without giving the details of the journey, went to Tallahassee, Florida. They spent a pleasant time together on that trip. During the latter part of March, after they had been in Tallahassee about ten days or two weeks, the plaintiff received a telegram from her family stating that her father was very ill, and requesting her to come immediately with the child to Clinton. Defendant at once told plaintiff that he would accompany her to Clinton, that under circumstances of this nature all differences of a personal character between him and her father should be forgotten by him, and this although the defendant knew that in his condition of health the change from Florida to central New York at that time of the year would be a very violent one and probably very dangerous to him. They went directly from Tallahassee to Louisville (it being the most direct route), and from there took the next train for Clinton. The plaintiff's father died before they got there. The defendant was taken ill at Clinton, and after being in bed four or five days, and unable to leave the house for probably a week, he left Clinton as soon as he was able to travel, and returned to his home in Louisville. Plaintiff and child remained at Clinton until about the middle of May, 1891, when they returned to Louisville, defendant meeting her at Cincinnati. After she returned home, and about the latter part of May, 1891, the de-
fendant, being quite unwell, requested the plaintiff to look
353 after the proper food for his condition. This brought on a discussion in regard to the defendant's health. The plaintiff expressed herself very much out of humor, and revived, substantially, the charge that defendant ought never to have married her.

The plaintiff expected to return to Clinton again to spend the summer with her mother, and defendant expected to join her there all the time he could. But after she had again renewed her complaints about his bad health, and expressing her dissatisfaction at her having married him, he felt that, as she was so unpleasant when he was with her and had anything the matter with him, that it would be necessary for him to go off somewhere else for a while, for quiet and freedom from worry, and he wanted to take the child and nurse with him this time instead of her taking it to Clinton. In some of these conversations at this time, defendant may have said to plaintiff that it was impossible that any woman who loved her husband in the right way should talk to him and treat him, and especially in matters of his health, as she had done, and that he thought it was a very unusual and unnatural way for a wife who pretended to have any feeling or respect for her husband at all to so talk and act. In response to some statement of this character,

about that time, the plaintiff said to defendant that she had no respect for him at the time she married him, and had had very little since. The result of this was a conversation in which there were present the defendant and the plaintiff and his father, in the course of which the defendant's father said, in effect, speaking to the plaintiff in defendant's presence, that he feared there was a radical difference between them as to their views of life and its duties; that she acted as if she thought there was no duty or responsibility
354 resting on her and nothing for her to do, while defendant thought he ought to work and make a living for his family, and do his duty as a man in the community in which he lived. The plaintiff replied that he was right, there was that difference between them; that she married to go to places of amusement, and to go into society, and to travel, and, when at home, to have a pleasant time with her husband, while defendant loved to work, and thought he ought to work, and she didn't marry with any expectation that he would do this; in considering the matter, however, the defendant told the plaintiff afterwards that when she was ready to go she might go to Clinton and take the child; during the summer he sent to his wife the money which his wife said she was to apply to the board of herself and her child at her mother's house (and defendant says that it was entirely proper for her mother to have charged board), and otherwise contributed to her comfort; during the summer the plaintiff and defendant corresponded regularly, their correspondence, however, being largely in reference to the child; in the early part of September, the defendant wrote plaintiff from Chicago that he expected in a few days to return to Kentucky, hearing that the weather was getting cool, and asked her to return with the child; she turned to Louisville with the child on the 26th of September, 1891; a few days after her return the defendant criticised the nurse, and properly, for the way she had of not properly feeding the child; the plaintiff showed in her manner great impatience at this; an hour or so afterwards the plaintiff and defendant had a conversation upon money matters, in which the defendant said to the plaintiff that he would give her thereafter an allowance of sixty dollars a month for her personal expenses, in order
355 that she might not make any bills, but that besides that she might buy what was necessary for the child; there was some unpleasant conversation following this; when the defendant was about to go down town, the plaintiff called to him to return; the plaintiff then told defendant she was not satisfied with the way she was being treated, and she was ready at any time to take their matters into court and decide as to who was at fault in the trouble which they had in their married life, and as to which one of them should have the custody of the child; she said that she wished she had remained at Clinton, and felt very much inclined to go back to Clinton and take the child with her; in the course of this conversation, the plaintiff charged the defendant substantially with infidelity, and said she could prove it; this charge was wholly false and unfounded; the defendant was very indignant, and naturally very angry and outraged, and said to plaintiff that no woman who

would make the charge which she had, without the slightest foundation or trace of truth in it, against her husband, ought to have the custody of any child; he then picked up the child from the floor, where it was sitting, and took it into another room; the plaintiff pushed her way into the room, and acted as if she intended to try to take the child away from defendant, and in a few moments the defendant handed over the child to the nurse, and left the room; there was a considerable degree of animated and angry talk between the plaintiff and defendant; the defendant, smarting under the indignation of the accusation which had been made, said that he could not with self-respect remain there, and intended to take the child to the Galt House hotel in Louisville; shortly after that the defendant heard the plaintiff in his mother's room, and going in there found that the plaintiff had told his mother that he had threatened to take the child away, whereupon he repeated
356 all that had occurred; the defendant's mother asked plaintiff if she believed the charge that she had made, and she said no, that she did not; during this interview the plaintiff was crying and started to defendant and put her hands on his shoulders; he did loosen her hands from his shoulders, not violently or roughly; nor did he injure her in any way, but he did say, as he did so, that he did not want her to touch him, as he would as soon touch a snake; he was at that time outraged beyond measure, and greatly excited under the insults and treatment he had received; after this interview defendant left his mother's room and went downstairs; he there saw his father and began to talk to him about the matter, and stated that he had been absent from the child for a long time, and that he had to go away for a while to recover from the insults, and that he would like to have the child with him, and he felt he had the right, as she had had it for five months, but that he had concluded that he would not take the child away, and asked his father to go upstairs and say so to the plaintiff; his father went upstairs, and returned, reporting the plaintiff and child were gone; the defendant immediately began a search for her, and found her at the house of Mrs. Belknap on Fourth street, in Louisville; he called on her there and requested her to return to her home; she positively refused to do so, and said that she had sent for her family; the defendant said that she had better come home and bring the child back home; she said she would come back if he would not in any way interfere with the child, but would give her the entire control of it; to this the defendant replied that he would agree not to take the child away, nor to deprive her of its society, but that he would not agree to live under the same roof with his own
357 child and have no part in its control or government; she then said she refused to return; and she was afterwards several times requested to return to her home, and refused to do so.

The defendant says that the plaintiff is of fickle, capricious and violent temper; that she was jealous of the affection of the defendant for his mother, and resentful of the affection of his father for his grandchild, and of the affection of the father and mother of the defendant for him; that she was suspicious, prone to construe innocent things

into evil ones, and to express and show to the defendant in words and manner that she had no respect for him, and no affection that was constant in its character or more than fitful in its manifestation; that frequently during the course of her married life she has accused the defendant of conduct that was discreditable, and indeed disgraceful, without there being either truth in the charges or any evidence to support them; that she persistently refused to accommodate her manner of life to his, become identified with him, or take any interest in those things which concerned his serious life; that from time to time she would say to the defendant things which would wound, annoy, insult and anger him; that when he would respond, even in a defense of himself against such accusations, or express any surprise that a wife should entertain such beliefs, she would at once consider herself the aggrieved party; that she would never make any allowance for anything she had said or done as provoking the defendant to say or do anything in answer thereto; and would remember against the defendant, and subsequently repeat and refer to, things said and done by him under the strongest provocation as having been done and said without any provocation at all.

358 The defendant says that he does not deny that from time to time during his married life with the plaintiff he has spoken to her, on occasions of provocation, vehemently, and with earnestness of tone and manner. He does not deny that he has spoken to her angrily. He does deny that he has ever spoken to her rudely or insultingly, or that he has ever intentionally done anything to wound or hurt her feelings, or to make her unhappy. He does deny that he has ever at any time, or in any way, committed any act of personal violence towards the plaintiff, or threatened to do so, or given her any reason to believe that he intended to do so. During their married life he provided the plaintiff liberally with money and clothes, allowed her to make large bills and himself paid them, and gave her the pleasure and advantage of frequent and expensive travel.

The defendant, further answering, says that the plaintiff is estopped to have or maintain this action against him because of the following facts:

Before the marriage of the plaintiff and the defendant, the defendant had been all his life a resident of and domiciled in the State of Kentucky. During the whole of the married life of the plaintiff and defendant, they were residents of and domiciled in the State of Kentucky, and it was in contemplation of such domicile that the marriage was celebrated. This domicile and residence continued during all of the matters complained of in the plaintiff's complaint. After the plaintiff abandoned the defendant, as she did on the 3rd day of October, 1891, he called to see her at the house of Mrs. Belknap, where she was staying, and requested her to return with the child which she had taken with her from the house, she having abandoned the defendant and taken the child away with her

359 secretly and without his knowledge or consent. She refused to so return except upon condition that the defendant should have no control at all over the child, or voice in its management or

rearing. Subsequently, on the same day, October 3rd, 1891, or the next day, this defendant caused an invitation to be conveyed to the plaintiff to return to the family residence and to him with the child, such return to be without exacting from plaintiff any conditions whatsoever, but freely and unconditionally; and being given not only freely and cordially, and voluntarily by himself, but united in by his father and mother, who lived under the same roof. The defendant says that this invitation, which was as broad and general and full as it could be made, was communicated by his friend and counsel to the counsel of the plaintiff, Mary G. Atherton, for her, and was by her said counsel communicated to her; that she instructed her said counsel to indicate to the friend and counsel of this defendant for defendant, and he did so indicate to him for defendant, a refusal of the offer; that two or three days thereafter there assembled in Louisville at the Galt house, where the plaintiff and the child were then staying, the aunt of the plaintiff, Miss Goodenow, her sister, Mrs. Evans, the husband of her sister, Mr. Evans, her cousin, Mr. Goodenow, who, defendant believes, lives in St. Paul, Minnesota, and her counsel, Mr. E. J. McDermott, of Louisville, and her counsel, Mr. C. D. Adams, of Utica; that shortly after the assemblage of these persons at the Galt house, the counsel for the plaintiff, Mr. C. D. Adams, Mr. McDermott, and her cousin and counsel, Mr. Goodenow, met the defendant's father and his counsel at the office of defendant's counsel at Louisville, for the purpose of friendly negotiation, to see what could be done with reference
360 to the differences between the plaintiff and defendant; that before the said conference was entered upon, counsel for the defendant demanded of the counsel for the plaintiff an assurance that so long as any negotiations were pending, the child of the plaintiff and defendant should not be removed beyond the boundaries of the State of Kentucky, and stated that unless such assurance was given they would immediately apply, on the behalf of the defendant, for a writ of *habeas corpus* and have the custody of the child settled; that upon the assurance being given that the child should not be taken beyond the boundaries of Kentucky, the negotiations went on. As a further prelude to such negotiations it was again distinctly stated by defendant's counsel and his father, that the defendant did now again invite the plaintiff to return with the child to her husband and his home, without any condition being made upon such invitation, and this invitation was again declined. Thereupon the negotiations proceeded and resulted, after three or four days almost entirely spent in conference between the representatives of the plaintiff and the representatives of the defendant (the representatives of the plaintiff going from time to time to her at the Galt house to receive their instructions from her), in the signing of an agreement in writing, a copy of which, marked "Exhibit A," is attached to this answer and made part of the same. By this agreement it was provided that the said child was committed for its entire education and control to the custody and guardianship of her mother, Mary G. Atherton, and her paternal grandmother, Maria B. Atherton, upon the following basis: That the domicile of

the child was to be the State of Kentucky; that the mother was to have the child until January 1st, 1892; that during the years 1892, 1893, and 1894, the grandmother was to have the child and control its abode from January 1st to the first
361 week in May, and the mother from the first week in May to December 31st. After that period, during the existence of this arrangement, the grandmother's custody, control, &c., was to exist during the first four and last two months of the year, that of the mother during the other months of the year. The agreement further provided as to moneys being paid by the said Peter L. Atherton into the hands of the said Mary G. Atherton in installments, for the comfortable maintenance of the child while it was in her custody, and that during the rest of each year he was himself, at his sole expense, to provide for the support of the child; and it was further provided that the expense of conveying the child, with a proper attendant, in the journey to the mother, Mary G. Atherton, was to be borne by the father, Peter L. Atherton, and the like expense back to the grandmother was to come out of the sum above provided for the child's support; and it was further provided that the said Peter Lee Atherton was to pay into the hands of Mary G. Atherton, for her support, $125 at the beginning of each month until this agreement should by its own terms end. There were various provisions made for the accidents of life (none of which have happened), as to the appointment of new guardians, and it was provided that the agreement as to the child was to terminate on her arrival at fourteen years of age, it being recognized that she will then be old enough to choose for herself, and that the agreement as to the support of Mary G. Atherton was to end at her death or upon her marrying, or, in any event, on January —, 1904. These and other provisions were declared by the agreement to be made for the contingency of various events that might happen in the future—among others, divorce and the second marriage of Peter Lee
362 Atherton and Mary G. Atherton; and the agreement further provided that if a divorce should be granted, this agreement, so far as concerns provisions for Mary G. Atherton, should be carried into the decree as in full satisfaction of all claim for alimony, and so far as concerns provisions for the care and custody of the child, reserving to the court the usual power to provide against events and contingencies in relation to the child not covered by this agreement. The said agreement was signed by plaintiff's cousin, Henry P. Goodenow, who contracted as trustee for Mary G. Atherton, by Mary G. Atherton, and by Peter Lee Atherton. At once after the signature of the said agreement there was paid to the said Mary G. Atherton by the said Peter Lee Atherton two hundred and fifty dollars; and then, a few days thereafter, the said Mary G. Atherton left the State of Kentucky, taking the child with her. The said Mary G. Atherton delivered the child to the paternal grandmother, Maria B. Atherton, in Cincinnati, Ohio, about the first week of January, 1892. The paternal grandmother redelivered the child to the said Mary G. Atherton, in the city of Buffalo, in the last week of April, 1892. The said Peter Lee Atherton caused to be paid into

the hands of the said Mary G. Atherton regularly, month by month, the amounts agreed upon for the support of the said child while in her custody, and also for her own support, up to and including a payment made in November, 1892. In November, 1892, the said Mary G. Atherton caused the said Henry P. Goodenow to give notice to the counsel for the said Mary G. Atherton, in Louisville, Ky., E. J. McDermott, and caused him to communicate such notice to the counsel for this defendant, that the plaintiff would no longer abide by the provisions and terms of the said agreement, and particularly that she would not respect the same in regard to her duty to deliver the
363 child to its paternal grandmother on the first day of January, 1893; in the month of December, 1892, the defendant caused to be sent to said Mary G. Atherton the amount of money stipulated under the said agreement, but she returned the same, declining to receive it, and declining to be bound by the said agreement; and ever since then the said Mary G. Atherton has retained the possession of the said child, and has kept it out of the State of Kentucky. The said Maria B. Atherton is and has always been ready, able and anxious to receive the said child and care for the same, and this defendant has been ready, able and anxious to perform said agreement on his part.

And now so it is, that the said plaintiff, under the pretense of coming to an amicable arrangement in regard to the custody of the said child and other matters incident to the said agreement, did obtain the control thereof, and did prevent this defendant from appealing to the courts of Kentucky, where both he and the said plaintiff and the said child were domiciled; and, having thus obtained the possession of the said child under the terms of the said agreement, has refused to be bound by it, or to carry it out; and therefore the defendant says that the plaintiff cannot come into a court of equity, under these circumstances; and that she ought not to be allowed to have or maintain this action.

The defendant, by way of further answer to the complaint herein, says that at and during the time of the matters complained of herein, and of the legal proceedings set forth herein, the following were provisions of the law of the State of Kentucky, in full force and effect in that State, to wit:

364 "Courts having general equity jurisdiction may grant a divorce for any of the following causes, to both husband and wife, to the party not in fault: Abandonment by one party of the other for one year."

"No petition for divorce shall be taken for confessed or be sustained by the admissions of the defendant alone, but must be supported by other proof."

"Action for divorce must be brought in the county where the wife usually resides, if she has an actual residence in the State; if not, then in the county of the husband's residence; and no such action shall be brought by any one who has not been a continuous resident of this State for a year next before its institution."

"An action for divorce must be brought within five years next after the doing of the act complained of."

These are, and were at the time of all the proceedings herein set forth, the provisions of the General Statutes of the State of Kentucky. All the said General Statutes were adopted by the legislature of the State of Kentucky, and approved by the governor thereof, and by their terms were made to and did take effect December 31st, 1873, and have continued in force ever since.

The defendant further says that the following were also provisions of the law of the State of Kentucky at and during the time of the acts complained of herein, and the legal proceedings set forth herein, to wit:

"In actions between husband and wife she may sue or be sued alone."

"That plaintiff, to obtain a divorce, must allege and prove, in addition to a legal cause of divorce, a residence in this State
365 for one year next before the commencement of the action; that the cause of divorce occurred, or existed, in this State; or, if out of the State, either that it was a legal cause of divorce in the State where it occurred, or existed, or that the plaintiff's residence was then in this State; that the cause of divorce occurred, or existed, within five years next before the commencement of this action."

"An action for alimony or divorce shall be in equity."

"An action for alimony or divorce must be brought in the county where the wife usually resides, if she have an actual residence in this State; if not, in the county of the husband's residence."

"SEC. 57. When constructive service allowed—How made.—If defendant be—1. A corporation having no agent in this State, known to the plaintiff, upon whom a summons can be lawfully served; or,

"2. A non-resident of this State, and believed to be absent therefrom; or,

"3. Have departed therefrom with intent to delay or defraud his creditors; or,

"4. Have been absent therefrom four months; or,

"5. Have left the county of his residence to avoid the service of a summons; or,

"6. To conceal himself that a summons cannot be served upon him; or,

"7. If his name and place of residence be unknown to the plaintiff;

"The clerk shall, subject to the provisions of section 58, make upon the petition and order warning the defendant to defend the action on the first day of the next term of the court which does not commence within sixty days after the making of the order."

366 "SEC. 28. When warning order can be made—Affidavit.—The clerk shall not make such warning order upon any of the grounds mentioned in subsections 1, 2, 3, 4 and 7, of section 57, except upon an affidavit of the plaintiff; or of his agent or attorney, if he be absent from the county; or if his guardian, curator, committee, or next friend, if he be under disability; or of the at-

torney of either of them, if absent from the county, stating the ground of the application for such order.

"2. Nor shall the clerk make such order on any of the grounds mentioned in subsections 1, 2 and 4, of section 57, unless the affidavit also state in what country the defendant, or, if the defendant be a corporation, in what country its chief officer or agent resides or may be found, and the name of the place wherein a post-office is kept nearest to the place where the defendant or its chief officer or agent resides, or may be found; or, unless the affidavit state the affiant's ignorance of such of those facts as he does not know.

"3. Nor shall the clerk make any such order upon any affidavit of an agent or attorney of the plaintiff, stating any of the grounds mentioned in subsections 1, 2, 4 and 7, of section 57, unless the affidavit state the affiant's belief that the plaintiff is ignorant of such of the facts as are unknown to the affiant.

"4. The clerk may make such order upon an affidavit of the plaintiff, or of his agent or attorney, if he be absent from the county; or of his guardian, curator, committee or next friend, if he be under disability; or upon the return of a summons by the proper officer, stating either of the grounds mentioned in subsections 5 and 6 of section 57.

367 "5. But the clerk shall not make such order upon the affidavit of an agent or attorney unless it also state the affiant's connection with the plaintiff, and the fact that he is absent from the county.

"6. An affidavit made pursuant to the foregoing provisions of this section, unless it be controverted by the defendant's affidavit, shall be sufficient evidence of the facts therein stated for the support of the action as well as of the warning order."

"SECTION 59. Appointment of attorney—His powers—Duty—Compensation.—The clerk, at the time of making such warning order, shall appoint, as attorney for the defendant, a regular practicing attorney of the court, but the court may, and for any reason which it deems good, shall appoint another attorney as a substitute for the attorney appointed by the clerk. Neither the plaintiff nor his attorney shall be appointed or be permitted to suggest the name of the defendant's attorney.

"2. Such attorney must make diligent efforts to inform the defendant, by mail, concerning the pendency and nature of the action against him, and must report to the court during the first term, which does not commence within sixty days after his appointment, the result of his efforts.

"3. The duties and powers of such attorney are governed by the last foregoing paragraph, unless he be employed by the defendant, or unless he be unable to inform the defendant concerning the action, or unless he learn that the defendant is under disability other than coverture, or other than infancy and coverture combined.

"4. Such attorney, if employed by the defendant, shall so report to the court, and such report shall be treated as an appearance of the defendant in the action.

368 "5. If such attorney cannot inform the defendant concerning the action, or if he learn that the defendant is under disability other than coverture, or other than infancy and coverture combined, he shall so report to the court, and shall make an affirmative defense if he can; or, if he cannot make such defense, he shall so report to the court, and shall be subject, with reference to such report, to the provisions of subsection 3 of section 36; and no act of his shall be treated as an appearance of such defendant.

"6. The provisions of subsection 4 of section 38 apply with reference to the compensation of such attorneys.

"7. No judgment shall be rendered against such defendant if under any disability other than coverture, or infancy and coverture combined, until a defense or report shall have been filed pursuant to subsection 5 of this section."

"SECTION 60. When defendant deemed constructively summoned.—A defendant against whom a warning order is made and for whom an attorney has been appointed shall be deemed to have been constructively summoned on the thirtieth day thereafter, and the action may proceed accordingly."

"SECTION 36, SUBSECTION 3. No judgment shall be rendered against an infant—other than a feme covert—nor against a person of unsound mind, who is summoned in this State, until the regular guardian, or committee, or guardian *ad litem*, of such defendant shall have made defense, or have filed a report, stating that after a careful examination of the case he is unable to make a de-
369 fense. His report, that he cannot make a defense, must be filed on or before the day for making defense, unless, for cause shown, the court extend the time; and failure to file such report, as required hereby, or by the court, shall be punished as a contempt."

"SECTION 38, SUBSECTION 4. The court shall allow to the guardian *ad litem* a reasonable fee for his services, to be paid by the plaintiff and taxed in the costs. The affidavit of such guardian, or of another person, or other competent evidence, is admissible to prove the services rendered, but not to prove their value. The court must decide concerning such value, without reference to the opinions of parties or other witnesses."

"In construing the provisions of this code these rules shall prevail unless a different intention be expressed or be shown by the context. Each gender includes every gender."

The above provisions are, and were at the times set forth herein, contained in an act of the General Assembly of the Commonwealth of Kentucky, entitled "An act to regulate practice in civil causes," which was duly passed by the legislature of Kentucky, approved by the governor thereof, and by its terms took effect on the 1st day of January, 1877, and has, except as amended, been in force ever since—and no amendments have in any way altered the provisions above referred to.

Under divers acts of the General Assembly of the Commonwealth of Kentucky, and amendments thereto, there had been, before the time of any acts complained of, established a court of general supe-

rior equity jurisdiction, entitled "the Louisville law and equity court;" and under the said law the said court was held in the county of Jefferson, State of Kentucky, and had general supe-
370 rior equity jurisdiction of all causes brought in said county; and, among others, actions for divorce. By the terms and effect of the law creating said court, it was to have no stated terms, but to be always open for the transaction of business; and further, by the provisions of law applicable to said court, orders of warning against absent and non-resident defendants were required to be so entered by the clerk as that the said defendant should be warned to appear and answer within sixty days after the entry of such order; and was to be deemed and was constructively summoned thirty days after the entry of such order of warning.

The defendant further states that he was born in the State of Kentucky, and has been since his birth a citizen and resident of said State, and for more than ten years last past a citizen and resident of Jefferson county, in said State; that immediately upon the marriage of himself and the plaintiff the said plaintiff came with this defendant, from her wedding trip, to the defendant's residence in Jefferson county, Kentucky, and the said Jefferson county, Kentucky, then became, and was during all the acts complained of, her actual residence and legal domicile, and was the said plaintiff's actual residence and legal domicile when, in October, 1891, she abandoned this defendant, and was such at the time of the commencement of the suit, and at the time of judgment hereinafter —.

The defendant further says, that on December 28th, 1892, he filed his petition in the said Louisville law and equity court, set forth his cause of action in apt terms, and praying a divorce from the said plaintiff, upon the ground that she had abandoned him in October, 1891, without his fault, and had continued such abandonment for more than one year then last past, and also filed his affi-
371 davit, wherein he stated, and it was true, that the said plaintiff had, on the said December 28th, 1892, been absent from the State of Kentucky for more than four months, and also stated where the said plaintiff might be found, and the post-office nearest to the place where she might be found; and thereupon the clerk of the said court, as was his duty so to do, entered an order warning the plaintiff (who was the defendant in that action) to appear and answer the said petition within sixty days from said December 28th, 1892, and appointed one John C. Walker, a regular practicing attorney of said court, to inform the said defendant of the institution of the said action.

The said attorney, Walker, on January 5th, 1893, soon after his appointment, wrote a letter containing a full statement of the nature and purposes of this suit, as shown by the petition, and enclosing a substantial copy of the petition, to the defendant, Mary G. Atherton, and placed the same in the post-office, addressed to her at her home in Clinton, New York, duly stamped, and with a return mark on the back of the envelope for it to be returned to him from the post-office if not received by her; the said letter was never returned to him, and defendant alleges that the said letter was received by her

and he alleges that the plaintiff knew of the pendency of this divorce suit from the time it was filed, or soon after that, and long before the judgment was rendered, and during the time it was pending, and knew of its nature and purposes, and voluntarily failed to defend the same.

The said attorney, Walker, on the 6th day of February, 1893, filed in said court his written report, stating the result of his efforts, and reported to the court that he could not make any defense in said case, which report was in accordance with the requirements of said statute.

372 By the laws of Kentucky the said defendant, Mary G. Atherton, was deemed to have been, and was, constructively summoned on the 28th day of January, 1893, which was thirty days after December 28th, 1892, when the said warning order was made.

After the institution of the said action in the said Louisville law and equity court, there was established, under laws enacted by the General Assembly of the Commonwealth of Kentucky, and under the new constitution of said State, a court for Jefferson county, Kentucky, entitled "the Jefferson circuit court," with certain branches or divisions—among others a branch or division styled "the law and equity division;" and said law and equity division was given the cognizance and jurisdiction of a general and superior court of record of legal and equitable causes, and among others, of divorce causes.

And it was provided by said laws that all causes pending in the Louisville law and equity court on January 1st, 1893, should be on that day deemed to be, and were transferred to, and should further proceed in, said Jefferson circuit court, law and equity division.

And among such causes so transferred was the action hereinbefore described, of this defendant against the plaintiff, for a divorce.

The same laws and practice that governed the said Louisville law and equity court as to such suits continued to govern the said Jefferson circuit court, law and equity division; and said court has continued ever since with the said jurisdiction and powers.

And defendant further says that the said action regularly
373 proceeded in said court, and after its transfer in the Jefferson circuit court, law and equity division; and that proof having been taken, and the said cause having come on regularly to be heard, the said plaintiff (who was the defendant therein) did not answer; but on the 14th of March, 1893, judgment was entered by the said court, in which it was considered and adjudged by the court that this defendant had resided in Jefferson county, Kentucky, continuously for ten years last past; *then* he and the plaintiff (defendant in that action), Mary G. Atherton, were married on the 17th day of October, 1888; that from the date of said marriage this defendant (who was the plaintiff in said action) and the plaintiff (who was the defendant in said action) had resided in Jefferson county, Kentucky; that while this defendant (the plaintiff in that action) and the plaintiff (the defendant in that action) were thus residing in Jefferson county, Kentucky, to wit, in the month of October, 1891, the plaintiff (who was the defendant in that action), Mary G.

Atherton, without fault of this defendant (the plaintiff in that action) abandoned him; and that said abandonment had continued without interruption from that time to the date of the entry of the said judgment, and at the filing of the petition in said cause had existed for more than one year; that the plaintiff (defendant in that action), Mary G. Atherton, had, at the filing of the petition therein, been absent from the State of Kentucky for more than four months, and that therefore it was further considered and adjudged by the court that this defendant (the plaintiff in that action), Peter Lee Atherton, was entitled to the decree of divorce prayed for in this petition, and that the bonds of matrimony between the defendant (who was the plaintiff in that action), Peter Lee Atherton, and the plaintiff (who was the defendant in that action), Mary G. Atherton, be, and they were thereby, dissolved.

374 And the defendant further says that there were other terms and clauses in said judgment not material now to be set forth. The said judgment has remained since the day of its entry in full force and effect and is binding and conclusive upon the matters therein adjudged.

The defendant further says that he is advised, and so states, that up to the entry of the said judgment the domicile and legal residence of the plaintiff herein remained and was in the county of Jefferson, State of Kentucky; and the defendant further says that at the time of the marriage of himself and the plaintiff it was in the contemplation of both parties that this defendant should continue his citizenship and residence in the State of Kentucky, and that said State of Kentucky should be the residence and domicile of this defendant and the plaintiff.

Defendant states that the said court had full and complete jurisdiction of the said suit and of the subject-matter thereof, and of the parties, and it had full jurisdiction and power to render the said judgment.

Defendant alleges that under the laws in force in Kentucky at the time of the said marriage, and ever since and still in force, the force and effect of said judgment was and is to constitute a complete divorce from the bonds of matrimony between this defendant and the plaintiff, Mary G. Atherton, and to make them no longer husband and wife from and after the date of the entry of said judgment, and to restore to them and each of them all the rights of an unmarried person.

Defendant states that under and by the Constitution of the United States of America it is provided, and it is the law, that full faith and credit shall be given in each State to the public acts,

375 records and judicial proceedings in every other State; and that Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved and the effect thereof; and in pursuance of said provision of said Constitution the Congress of the United States has by general laws prescribed the manner in which such acts, records and proceedings shall be proved, and the effect thereof, as follows, to wit:

"SECTION 905. The acts of the legislature of any State or Terri-

tory, or of any country subject to the jurisdiction of the United States, shall be authenticated by having the seals of such State, Territory or country affixed thereto. The records and judicial proceedings of the courts of any State or Territory, or of any such country, shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, that the said attestation is in due form. And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken."

Defendant alleges that the said record and judicial proceeding, so authenticated, have, by law and usage, in the courts of the State of Kentucky, in which they were taken, the force and effect of divorcing this defendant from the plaintiff, and of severing the bonds of matrimony between them, so that they are no longer husband and wife, and of giving to them all the rights, immunities and privileges of unmarried persons. And this defendant pleads the said
376 record, proceedings and judgment in bar of any proceedings in this case against this defendant, and asks that full force and effect be given to said judgment, record and proceedings, as provided for in the Constitution of the United States and acts of Congress in pursuance thereof.

Defendant further says that he is ready, able and anxious to assume the care, custody and education of his child, Mary Valeria Atherton; that he is able to and will give to her all the advantage of careful rearing, education and mental and moral training; that he is the only child of his parents, both of whom are living; that the child will be under the affectionate and judicious management of his mother and father, and that it will be for the best interest of the said child that it shall be reared and educated where it can be cared for by this defendant and his father and mother, who are the grandfather and grandmother of the said child.

Wherefore defendant respectfully asks the court to order a dismissal of the complaint herein; that the defendant be awarded the custody of the child, with costs, &c., and that judgment be entered accordingly.

STATE OF KENTUCKY, } ss:
Jefferson County, }

Peter Lee Atherton, being duly sworn, deposes and says, that he is the defendant in this action; that he has read the foregoing answer and knows the contents thereof, that the same is true to the knowledge of deponent, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

PETER LEE ATHERTON.

Sworn to before me this 24th day of March, 1893.

WM. L. JACKSON,
Judge Jefferson Circuit Court.

377 I, Wm. L. Jackson, judge of the Jefferson circuit court in and for the State of Kentucky, do hereby certify, that upon the 25th day of March, 1893, personally appeared before me in Louisville, State of Kentucky, Peter Lee Atherton, to me known, and in my presence swore to and subscribed the above affidavit of verification.

In witness whereof I have hereunto placed my signature this 25th day of March, 1893.

WM. L. JACKSON,
Judge Jefferson Circuit Court.

I, John S. Cain, clerk of the Jefferson circuit court, in and for the State of Kentucky, do hereby certify that Wm. L. Jackson, whose signature is attached to the preceding certificates, is a judge and member of the Jefferson circuit court; that said court is a court now existing in the State of Kentucky, and has a seal which is hereto affixed, and that the signature attached to said certificates is the genuine signature of said Wm. L. Jackson.

Seal Jefferson Circuit Court, Kentucky.

In witness whereof I do hereto affix my signature and the seal of said court, this 25th day of March, 1893.

JOHN S. CAIN,
Clerk Jefferson Circuit Court.

"EXHIBIT A."

378 The undersigned, Peter Lee Atherton, and his wife, Mary G. Atherton, having ceased to live together as man and wife, without in any way acknowledging upon whom is the fault, or condoning the conduct of the one or the other which has led to the existing state of affairs, or preventing any consequence which may follow, or right which may arise to either party if such status shall continue, desire to provide for the best interest of their child, Mary Valeria Atherton. With this view they have entered into the following agreement:

Peter Lee Atherton contracting with Henry P. Goodenow as trustee for Mary G. Atherton, and said trustees contracting with Peter Lee Atherton on behalf and jointly with Mary G. Atherton.

1. The child is hereby committed for its nurture, education, and control to the joint custody and guardianship of her mother, Mary G. Atherton, and her paternal grandmother, Maria B. Atherton, on the following basis:

The domicile of the child is to be the State of Kentucky. The mother is to have the child until January 1, 1892. During the years 1892, 1893, and 1894, the grandmother is to have the child and control its abode, travel and custody from January 1st to the first week in May; and the mother from the first week in May to December 31st. After that period, during the existence of this arrangement, the grandmother's custody, control, etc., is to exist during the first

four and last two months of the year; that of the mother during the other months of the year.

2. During that part of each year in which the child is under the control of the mother, Peter Lee Atherton is to pay into the hands of Mary G. Atherton $500 in installments of equal amounts
379 at the beginning of each of the months of said control, for the comfortable maintenance of the child. During the rest of each year, he is to himself at his sole expense provide for the support of the child. The expense of conveying the child with a proper attendant, in the journey to the mother, Mary G. Atherton, is to be borne by the father, Peter Lee Atherton, and the like expense on the journey back to the grandmother, is to come out of the sum provided for the child's support.

3. Peter Lee Atherton is to pay into the hands of Mary G. Atherton for her support $125 at the beginning of each month, until this agreement does by its own terms end. This is to be taken in lieu of alimony and dowable and distributable share in his estate.

4. The following provisions are made for the termination of this agreement and for the contingency of various events that may happen in the future; among others, divorce and second marriage of Peter Lee Atherton or Mary G. Atherton.

a. This agreement as to the child, is to terminate on her arrival of fourteen years of age, it being recognized that she will then be old enough to choose for herself. It shall, of course, terminate in like manner at her death.

b. This agreement as to the support of Mary G. Atherton is to end at her death, or upon her again marrying, and in any event on the 8th day of January, 1904.

c. If Mary G. Atherton shall marry again or die, the person then being joint guardian with her of the child shall become its sole guardian. If Maria B. Atherton shall die while she is joint guardian, Peter Lee Atherton, if alive, or if he be dead, his father, John M. Atherton, shall choose a successor in the joint guardian-
380 ship; and if Mary G. Atherton objects to the person so nominated, the senior (in years) judge of the Jefferson circuit court shall decide the question of fitness, and confirm or reject such nomination.

d. A successor to said successor may under similar circumstances be in like manner chosen.

e. If, during the existence of this agreement, Mary G. Atherton, being then joint guardian, John M. Atherton and Maria B. Atherton shall die, and Peter Lee Atherton die or be or become married, the sole guardianship shall rest in said Mary G. Atherton.

f. If, during the lives of Peter Lee Atherton and Mary G. Atherton, a sole guardianship shall have resulted under the terms of this agreement, each parent shall have reasonable access to and right of visitation from the child, notwithstanding such parent may have again married.

g. If a divorce shall be granted, this agreement, so far as it concerns provision for Mary G. Atherton, shall be carried into the decree, as in full satisfaction of all claim for alimony, and so far as

concerns provision for and custody of the child, reserving to the court the usual power to provide against events and contingencies in relation to the child not covered by this agreement.

Witness the signature of all the parties this October 10th, 1891.

HENRY P. GOODENOW.
MARY G. ATHERTON.
PETER LEE ATHERTON.

In the presence of—
EDWARD J. McDERMOTT.
C. D. ADAMS.

381 Supreme Court.

MARY G. ATHERTON *against* PETER LEE ATHERTON. } Reply.

The plaintiff, as and for her reply to the answer of the defendant in this action, and to so much of said answer as alleges or tends to allege any counter-claim to the complaint of the plaintiff in this action, and to the cause of action alleged in such complaint, says:

This plaintiff admits the signing of the agreement mentioned in the said answer, and an alleged copy of which is annexed to the said answer. But this plaintiff alleges that this said agreement was procured from this plaintiff and signed by her under the following circumstances:

For some time prior to and at the time the said agreement was signed by this plaintiff, owing to and by reason and in consequence of the cruel and abusive treatment and conduct of the said defendant of and towards this plaintiff, and of his threats to take from her and deprive her of her child, as alleged and set forth in the said complaint, this plaintiff had become and was very apprehensive and fearful that her child would be taken from her and she would be deprived of it, and had become and was extremely exhausted, nervous, weak and sick in body, and greatly excited, distressed, depressed and weakened in mind, so much so that she was utterly unfit to make any agreement or to make the agreement mentioned in the said answer of the defendant. That when the said agreement was proposed to her she objected to the same, and especially to

382 the provisions therein as to custody of her child, and depriving her of its care and custody during a portion of the time, and absolutely refused and declined to consent to or to make or sign such agreement.

That thereupon, to induce plaintiff to sign the same, it was stated and represented to this plaintiff, among other things that such agreement was not and would not be permanent, and that it was intended to be and would be a mere experiment and temporary arrangement, and that it would not be binding upon this plaintiff if she became dissatisfied with the same; that it was for a year only, and would be binding upon the plaintiff only for a year at most, and that at the end of a year this plaintiff would be free from the same, and the same would not be binding upon her.

That this plaintiff believed and relied upon the truth of such statements and representations, and so relying upon and believing the same was induced to and did sign the said agreement.

That but for such statements and representations, and her belief and reliance upon the same, and but for the fact that she understood and believed that the agreement would not be permanent, and that it was intended to be and was and would be a mere experimental and temporary arrangement, and would not be binding upon her if she became dissatisfied with the same; and that it was for a year only, and would be binding upon her only for a year at most, and that at the end of a year she would be free therefrom, this plaintiff would not have consented to sign, and would not have signed, the said agreement.

383 This plaintiff alleges, upon information and belief, that at the time the said agreement was signed it was not intended or understood by any of the parties to the said agreement that such agreement was or would be permanent, but that it was intended and understood by such parties to be merely temporary and experimental, and would be binding upon the parties thereto at most for a year only.

And this plaintiff alleges, as she is advised and believes, that by reason of the condition in body and mind of this plaintiff and of the manner in which this plaintiff was induced to sign the said agreement as aforesaid, the said agreement was not and is not a good and valid agreement and should not be and is not binding upon this plaintiff, and that the same was and is null and void as to this plaintiff, and this plaintiff prays the court that it may so adjudge and decree.

The plaintiff, further replying to the said answer of the defendant, says:

That as to the allegations in the said answer of the statutes and laws of the State of Kentucky, and of the commencement of and proceedings in the alleged action in the State of Kentucky, and of the alleged judgment recovered therein, as claimed and alleged in said answer, this plaintiff denies any knowledge or information of such allegations, or of any of them, sufficient to form a belief, and therefore denies the same.

This plaintiff further says that no process in the said alleged action was ever served upon this plaintiff, and that if the alleged action was commenced, and if the alleged judgment, or any judgment, was recovered therein, the same was not and is not binding upon this plaintiff, and was not and is not a bar to this action.

384 Wherefore this plaintiff prays for the relief and judgment demanded in her complaint in this action.

W. & N. E. KERNAN,
Attorneys for Plaintiff, Devereux Block, Utica, N. Y.

At a special term of the supreme court in and for the county of Oneida, commencing at Rome on the first Tuesday of June, 1893, and adjourned to Utica, N. Y.

Present: Hon. P. B. McLennan, justice.

Supreme Court, Oneida County.

MARY G. ATHERTON
against
PETER LEE ATHERTON.

This action having been tried by the court without a jury, I hereby make and find the following findings of facts:

First. That on the 17th day of October, 1888, the plaintiff and defendant were married at Clinton, Oneida county, New York, the plaintiff then being twenty-two years of age, and was a lady of culture and refinement.

Second. That prior to and at the time of such marriage the plaintiff had been and was a resident of the State of New York, residing at Clinton, in the county of Oneida, in said State, and that said defendant had been and was a resident of the State of Kentucky, residing at Louisville, in said State, and a man of means.

385 *Third.* That immediately after said marriage the said plaintiff and defendant went to and resided at said Louisville, in said State of Kentucky, in the house with defendant's parents, and that they continued to reside there as husband and wife until the plaintiff left the defendant, as hereinafter stated, in October, 1891.

Fourth. That a child of said marriage was born to the said plaintiff and defendant on the 8th day of January, 1890, being a daughter, and her name is Mary V. Atherton.

Fifth. That on or about the 3rd day of October, 1891, the said plaintiff left the house of the defendant and the defendant at said Louisville, taking with her the said child, and in a few days thereafter returned with said child to her mother at Clinton, Oneida county, New York; and that since that time she has resided at said Clinton with her said child, and has been and is a resident of the State of New York, and has not lived or cohabited with the said defendant.

Sixth. That after the said plaintiff had left the said defendant and on or about October 10th, 1891, the said plaintiff and defendant and one Henry P. Goodenow, entered into an agreement dated the 10th day of October, 1891, which was put in evidence by the defendant.

Seventh. That when the said plaintiff so left the house of the defendant and the defendant on the 3rd day of October, 1891, and came to Clinton, in the State of New York, she so left with the purpose and intention on her part not to return to the State of Kentucky, but to perman-tly become a resident of and reside in the State of New York, and her said purpose and intention was thoroughly

386 understood by the defendant at that time; and such departure by her from the State of Kentucky to the State of New York with said purpose and intention of not returning *the* the State of Kentucky, but to permanently reside in the State of New York, was contemplated and evidenced by the said agreement entered into between the plaintiff and defendant.

Eighth. That since the plaintiff so left the said defendant, the said

defendant has continued to reside and now resides at said Louisville, and has been and is a resident of the State of Kentucky.

Ninth. That soon after the marriage of the plaintiff and defendant and continuing down to the time when the plaintiff left the defendant's house and the defendant in October, 1891, as hereinbefore found, the said defendant was guilty of cruel and inhuman treatment to the said plaintiff without any good reason, and without any cause on her part. He so commenced to treat her cruelly soon after their marriage and continued such course, increasing in extent, during their entire married life down to October, 1891, until he finally drove her from him. Without any just cause or reason he became dissatisfied with the relations existing between her and other members of her own family. Upon repeated occasions he charged her with being shamefully heedless of his wishes, with being a vain, unloving woman, reckless any extravagant and of having married him only to spend his money. Upon repeated occasions he charged her with being unloving, unnatural, indecent, nasty, a dirty, nasty thing, worse than a nigger; with being a false unnatural wife and not fit to be married; that she was no wife and was a shameful woman and low and mean, and worse than any nigger in the street; that she was an unloving wife and did not love him,
387 that she was unwomanly, impure and immodest; that she was an unloving, unnatural mother, too lazy to take care of her child, and that the beasts of the field loved their young more than she loved her child; that she was false as a woman and unnatural as a wife, and had been recklessly extravagant, and had taken his money to send to her nasty family, and that he would publish her in all the shops; that she was a dirty, nasty cat, and a dirty, disreputable woman; that she was not his wife, but only his mistress, and that she was like a common woman in the street; that on one occasion when he threatened to divorce her she said such threats tortured her, and he said he would like to torture her; that she was an indecent woman, and deserved to be tortured as much as a man could; that he had had all he wanted of her; that he used many other names and epithets of and concerning her, of a like character. He often treated her with rudeness, and did so before the servants in the house. He said to her that her mother was no lady, and a vile woman, and that her father was a dead beat, a low-lived cur, and a dirty, lazy slouch, and that she was just like him in all those things. And on other occasions he spoke insultingly to her of and concerning her family. Before her child was born he said to her that he and his father had made their wills, cutting her off, and he would be glad to see her poverty-stricken and penniless; that he did not love her, and that he was only waiting until the baby was born, and then he would divorce her; and on several other occasions he threatened to divorce her and take her child from her. That in talking to her in this way he became and was very angry; talked in a loud, excited, boisterous, and abusive manner, not only when they were alone, but in the presence of others, and at times
388 when she was ill and confined to her bed, both before and after the birth of her child; and on many of the occasions

he walked up and down the room shaking his hands and fists at her, and in her face. That on one occasion he seized her roughly by the arm and shoulder and dragged her back into the room, and her arm and shoulder were bruised, and the marks of his hands remained there for a day or two. When, on one of these occasions, she attempted to put her arms around his neck he took her arms down and flung her from him, saying that he would sooner touch a snake than to touch her; and he flung her so hard that she fell against the foot of the bed and was bruised. On one occasion, in addition to saying that he did not love her and would divorce her, and that she was an indecent woman and not fit to take care of her child, and that he would take it from her, and that she should not have the child any longer, he roughly seized the child from her arms and took the child into another room; and when the plaintiff tried to follow him, defendant took her by the arm and shoulder and pushed her from the room, saying he had made arrangements to take the child away and — should never see it again; that defendant's language to and treatment of the plaintiff on these occasions were such as to often cause her to weep bitterly and to become nervous, distressed, and excited, and to keep her in almost a constant state of fear, and were such as to seriously affect her health, and make it dangerous to her health to continue to live with him; that defendant had no just or reasonable cause or grounds for such treatment of the plaintiff, and there was no act or omission on her part justifying the treatment and language which she so received from the defendant; that the acts and conduct and treatment of the defendant of and towards the plaintiff during their married life were cruel and inhuman and rendered it unsafe and improper for her
389 to cohabit with him, and justified her in leaving the defendant as she did and seeking a residence separate and apart from him.

Tenth. That during their married life plaintiff lived in great fear of defendant, that he would do her bodily harm, and was often afraid that he would do her bodily injury; that after the birth of her child, by reason of defendant's said treatment of plaintiff, she became nervous, excited and hysterical and ill, and a physician had to be and was called to visit her on several occasions, and, according to the testimony of such physician, if the causes of the condition in which he found her continued it would seriously injure her health; this treatment of the defendant seriously affected and impaired plaintiff's health and often made her sick so that she was confined to her bed for several days at a time.

Eleventh. When plaintiff left the defendant in October, 1891, she did so on account of this long-continued cruel and inhuman treatment, for which there was no cause or provocation on her part, and she was justified in so leaving; and there was no thought or suggestion as to any other reason for leaving him, except for such cruel and inhuman treatment.

Twelfth. That when the said plaintiff so left the defendant in October, 1891, she left the State of Kentucky with the intention of coming to the State of New York, and with the intention of chang-

ing her residence and domicile from the State of Kentucky to the State of New York, and to make her residence and domicile in the State of New York; and thereupon she became and since has been a resident of the State of New York, and such State of New York became and was and is her domicile and home.

390 *Thirteenth.* After plaintiff left the defendant, in October, 1891, and while she and her child were residing in the village of Clinton, in the State of New York, and in December, 1892, the defendant commenced an action in the Jefferson circuit court, law and equity division, of the State of Kentucky, praying for a judgment divorcing him from the bonds of matrimony with the plaintiff, alleging that she had abandoned him in the month of October, 1891, without fault on his part, and that such abandonment had continued without interruption for the period of more than one year; the petition was not served upon the plaintiff within the State of Kentucky or at all, and she did not appear in the action or proceedings in any manner; that such proceedings were had in said court of the State of Kentucky that on or about March 14th, 1893, a decree was made and entered in the said court of the State of Kentucky dissolving the bonds of matrimony between the plaintiff and defendant. That prior to the commencement of said action, and at the time of the commencement of said action, and ever since, the plaintiff had ceased to be a resident of the State of Kentucky, but had become and was a resident of the State of New York, domiciled and residing in the village of Clinton, in the State of New York, with her child. She was not personally served with process within the State of Kentucky, or at all, nor did she in any manner appear or authorize an appearance for her in the said action and proceeding. Before the commencement of the said action she had left the State of Kentucky, and had come to the State of New York, with the purpose and intention of making the State of New York her permanent residence and domicile, which was well known to the defendant.

391 *Fourteenth.* At the time the said action for divorce was commenced by the defendant against the plaintiff in the State of Kentucky, and during the pendency of said action, the plaintiff was domiciled in the State of New York, and had become and was a resident and citizen of the State of New York, and no service of process in said action was made upon her, and she had not and did not appear in said action, and therefore the judgment of divorce rendered in that action was inoperative, null and void as to her, and is no bar to this action and not binding upon her.

Fifteenth. That this action was commenced in January, 1893.

Sixteenth. The plaintiff is well qualified to properly care for, educate and bring up the child, Mary V. Atherton.

As conclusions of law I find and decide as follows:

First. That the judgment and decree of divorce obtained by the defendant in the State of Kentucky was, and is inoperative, null and void as to the plaintiff, and is no bar to this action, and is not binding upon her.

Second. That the said agreement between plaintiff and defendant of October 10th, 1891, is no defense or bar to this action.

Third. That the plaintiff is entitled to a judgment separating her from the said defendant, and from his bed and board forever.

Fourth. That the said plaintiff have the custody, care and education of the said Mary V. Atherton, the daughter of the said plaintiff and defendant.

392 *Fifth.* That the said defendant pay to the said plaintiff, as alimony, and for her support and maintenance, the sum of $125 for each and every month, commencing at this date; and that he also pay to the said plaintiff for the care, maintenance and education of the said child, Mary V. Atherton, the sum of $100 each and every month, commencing at this date; and that such payments be made to the said plaintiff at Clinton, New York, each and every month.

Sixth. That the said defendant pay to the said plaintiff or her attorneys, and that the said plaintiff recover of him the sum of $1,000 counsel fee allowed in this action, and that she have execution therefor.

Seventh. That the plaintiff recover of said defendant her costs and disbursements in this action, and that she have execution therefor.

Eighth. That the said defendant shall have the right to see the said child, Mary V. Atherton, to visit her at all reasonable times at Clinton, Oneida county, New York, or at any other place where she may be residing with her mother.

Ninth. That judgment be entered in accordance herewith.

Dated and signed January 6th, 1894.

P. B. McLENNAN,
Justice Supreme Court.

At a special term of the supreme court in and for the county
393 of Oneida, commencing at Rome, on the first Tuesday of June, 1893, and adjourned to Utica, N. Y.

Present: Hon. P. B. McLennan, justice.

Supreme Court, Oneida County.

MARY G. ATHERTON
against
PETER LEE ATHERTON. } Judgment.

The summons in this action with the notice thereon as required, stating that this action was brought for a separation, having been duly served upon the defendant by publication, and the said defendant having thereafter appeared in this action by Seth C. Adams, Esq., his attorney, and an answer to the complaint herein having been thereafter served by the said defendant, and the case being regularly on the calendar of a special term of this court held at Utica, N. Y., in and for the county of Oneida, on the 12th day of June, 1893, and the issues herein having been regularly brought on for trial and tried before Mr. Justice McLennan at the said special term, and the said justice having made and rendered his decision and findings herein in writing in favor of the said plaintiff and

against the said defendant, and directing this judgment herein: Now, therefore, upon reading and filing the summons and said notice thereon and the order and proofs of publication thereof, and of mailing the summons and notice and complaint herein, and on reading and filing the complaint herein and the notice of appearance of Seth C. Adams, Esq., attorney for said defendant, and
394 the answer of said defendant, and the decision and findings of the said justice, on motion of W. & N. E. Kernan, attorneys for the said plaintiff—

It is adjudged and decreed, that the said plaintiff be and she is hereby forever separated from the said defendant, and from his bed and board, upon the ground of cruel and inhuman treatment of the said plaintiff by the said defendant, and that the conduct of the said defendant towards the plaintiff renders it unsafe and improper for the said plaintiff to cohabit with him.

And it is further adjudged and decreed, that the said plaintiff have the care, custody and education of the child of said plaintiff and defendant, Mary V. Atherton, and the care, custody and education of the said child is hereby awarded to the said plaintiff.

It is further adjudged and decreed, that the said defendant pay to the said plaintiff the sum of one hundred and twenty-five dollars per month from the date of this judgment, January 6th, 1894, as alimony and for the separate support and maintenance of said plaintiff during her natural life. And that the said sum be paid to said plaintiff on the first day of each month at Clinton, Oneida county, New York, and that plaintiff have execution therefor from time to time in case of non-payment.

It is further adjudged and decreed, that the said defendant pay to the said plaintiff the sum of one hundred dollars per month from the date of this judgment, January 6th, 1894, for the care, maintenance and education of the said child of said marriage, Mary V. Atherton, so long as she shall live and until she shall attain the age of twenty-one years. And that the same be paid to the said plaintiff on the first day of each month, at Clinton, Oneida county, New York, and that plaintiff have execution therefor from time to time in case of non-payment.

It is further adjudged and decreed, that the said defendant pay to the said plaintiff, or to W. & N. E. Kernan, her attorneys, and that she recover of defendant, the sum of one thousand dollars, counsel fee allowed to said plaintiff in this action; and that
395 the said plaintiff recover of and from the said defendant the sum of two hundred and twenty-nine dollars and thirty cents, her costs and disbursements in this action, amounting in all to the sum of one thousand two hundred and twenty-nine dollars and thirty cents, and that she have execution therefor.

It is further adjudged and decreed that the said defendant shall have the right to see the said child, Mary V. Atherton, and to visit her, at all reasonable times, at Clinton, Oneida county, New York, or at any other place where she may be residing with her mother.

Enter Oneida Co.

P. B. McLENNAN,
Justice Supreme Court.

Supreme Court.

MARY G. ATHERTON
against
PETER LEE ATHERTON.

Exceptions by defendant to the findings of the court in the above-entitled action:

1. The defendant excepts to that part of the second finding which finds defendant is "a man of means."

396 2. The defendant excepts to the third finding of fact.

3. The defendant excepts to the fifth finding of fact.

4. The defendant excepts to the seventh finding of fact.

5. The defendant excepts to the ninth finding of fact.

6. The defendant excepts to the tenth finding of fact.

7. The defendant excepts to the eleventh finding of fact.

8. The defendant excepts to the twelfth finding of fact.

9. The defendant excepts to that portion of the thirteenth finding of fact which finds "that prior to the commencement of said action, and at the time of the commencement of said action, and ever since the plaintiff had ceased to be a resident of the State of Kentucky, but had become and was a resident of the State of New York, domiciled and residing in the village of Clinton, in the State of New York, with her child. * * * Before the commencement of said action she had left the State of Kentucky and had come to the State of New York with the purpose and intention of making the State of New York her permanent resident and domicile, which was well known to the defendant."

10. The defendant excepts to the fourteenth finding of fact.

11. The defendant excepts to the sixteenth finding of fact.

Exceptions to Conclusions of Law.

First. The defendant excepts to the first conclusion of law.

Second. The defendant excepts to the second conclusion of law.

Third. The defendant excepts to the third conclusion of law.

397 *Fourth.* The defendant excepts to the fourth conclusion of law.

Fifth. The defendant excepts to the fifth conclusion of law.

Sixth. The defendant excepts to the sixth conclusion of law.

Seventh. The defendant excepts to the seventh conclusion of law.

Eighth. The defendant excepts to the eighth conclusion of law.

Ninth. The defendant excepts to the ninth conclusion of law.

January 15, 1894.

To the clerk of the county of Oneida, and W. & N. E. Kernan, plaintiff's attorneys.

SETH C. ADAMS,
Attorney for Defendant,
Utica City National Bank Building, Utica, N. Y.

Supreme Court, Oneida County.

MARY G. ATHERTON
against
PETER LEE ATHERTON.

Requests to Find as to Fact and Law on the Part of the Defendant.

1. Requests as to fact.

2. That this action was commenced on or about January 13, 1893. *Found. P. B. M., J. S. C.*

398 3. That the plaintiff and defendant were married at Clinton, Oneida county, State of New York, on the 17th day of October, 1888. *Found. P. B. M., J. S. C.*

4. That the defendant at time of marriage was a resident of Louisville, Kentucky, and the plaintiff resided at said Clinton. *Found. P. B. M., J. S. C.*

5. That immediately after the marriage and up to the present time the defendant resided at said Louisville. *Found. P. B. M., J. S. C.*

6. That the said plaintiff immediately after the marriage and up to the third day of October, 1891, resided with said defendant as her husband at said Louisville. *Found. P. B. M., J. S. C.*

7. That said plaintiff's domicile immediately after the said marriage and from that time until March 4, 1893, has been at Louisville, Kentucky. *Refused. P. B. M., J. S. C.*

8. That on January 8th, 1890, a child named Mary Valeria was born unto the plaintiff and defendant. *Found. P. B. M., J. S. C.*

9. That the plaintiff secretly left her husband October 3d, 1891. *Refused. P. B. M., J. S. C.*

10. That on the 10th of October, 1891, said plaintiff and said defendant entered into a written agreement of separation, which appears as Exhibit A, annexed to the answer herein. *Found. P. B. M., J. S. C.*

11. That said agreement was duly executed by all the parties thereto. *Found. P. B. M., J. S. C.*

12. That on December 28, 1892, the defendant commenced
399 an action for divorce against the plaintiff herein in the State of Kentucky, in the law and equity court of Louisville, by means of substituted service, as provided for by the laws of said State and the rules of practice in said State in case of the absence from the State of the defendant in said action. *Found. P. B. M., J. S. C.*

13. That said plaintiff herein was absent from said State of Kentucky at the time of the commencement of said divorce action, and has ever since been so absent. *Found. P. B. M., J. S. C.*

14. That substituted service was duly made on said plaintiff herein, and her due appearance in said action was entered according to the laws of Kentucky and rules of practice of the courts in said Kentucky which governed the substituted service in said State

in case of the absence of a defendant domiciled in the State. *Refused, except as found in decision. P. B. M., J. S. C.*

15. That the laws and rules of practice of said State of Kentucky governing such substituted service are set forth in the answer in this action, and that such laws and rules are those existing in said State at the time of the commencement of said action. *Found. P. B. M., J. S. C.*

16. That the said law and equity court of Louisville, Kentucky, had full and complete and legal jurisdiction of said action for divorce so commenced in said State, and of the subject-matter thereof and of the parties thereto. *Refused. P. B. M., J. S. C.*

17. That said action was duly brought to a hearing in said court of Kentucky, at a regular term thereof, and that on the 14th day of March, 1893, a judgment was entered in said action dissolv-
400 ing the marriage relation between the said plaintiff and defendant therein, they being the parties to this action, and permitting either party to again marry. *Refused, except as found in decision. P. B. M., J. S. C.*

18. That the following allegations set up in the complaint in this present action as constituting cruel and inhuman conduct on the part of the defendant towards the plaintiff, or grounds for separation, are not proven. These allegations appear below in paragraphs from No. 19 to and including No. 45. *Refused. P. B. M., J. S. C.*

19. That in January, 1889, defendant reproached plaintiff as to her failure to care for his health, and other matters alleged in the same paragraph in the complaint, at folio 5.

20. That defendant, on or about May 11 or 12, 1889, at Louisville, brandished a pistol and threatened her with it, and said, "I hope the thing within you will perish," &c., and became very angry and violently reproached plaintiff.

21. That in May, 1889, defendant claimed his mother had intercepted a letter to plaintiff from her mother, and had read it, and defendant and his mother threatened to publish said letter on several occasions.

22. That in July, 1889, at Clinton, N. Y., defendant was very angry, and left while plaintiff was still confined to her bed from a fall, and threatened her with letter from her mother, angrily charging that there was a conspiracy between plaintiff and her mother to insult him, and the other matters alleged in the same paragraph in complaint herein, from folios 8 to 11, inclusive.

23. That in 1889, about September 22, defendant became
401 angry and called plaintiff a dirty nigger and worse than any nigger, a shameful wife, false and mean, &c., as appears in folio 11 of complaint.

24. That in January, 1890, about a week before confinement at Clinton, defendant spent most of the night angrily abusing plaintiff about a room, &c., as is alleged in folios 12 and 13 of the complaint herein.

25. That in 1890, soon after birth of child, defendant became very unkind and abusive toward plaintiff, and about January 10, 1890, scolded plaintiff because child was in cot where nurse had

placed it, instead of in bed with plaintiff, and said she was an unnatural mother, and did not love her child or she would have it in bed with her; that even the beasts loved their young, but she did not, as is alleged at folio 14 of complaint herein.

26. That when child was only three days old, defendant insisted he would stay in plaintiff's room over night; that plaintiff remonstrated with him, whereupon defendant became very angry and abusive to plaintiff, and said she was unnatural and unloving, and preferred hirelings to her husband, &c., as alleged in folio 15 of complaint herein.

27. That defendant from time to time continued abusive talk and scolding, and unkindly contradicted plaintiff and nurse; that the acts and conduct of defendant after birth of child so worried plaintiff that she had a nervous chill about January 25, 1890, and another on January 27, 1890, and was so sick that a doctor had to be called in, as alleged in complaint herein, folio 16.

28. That about January 28, 1890, the defendant became very angry and said she was unnatural as a wife, false as a woman, shook his fist at her, and was very violent in his manner, as alleged in folios 16 and 18 of complaint.

402 29. That about March 21, 1890, at Louisville, defendant began to talk to plaintiff about money and became angry, &c., and said he would publish her in all the stores—would not pay any bills for her—that she was not fit to take care of her child, that she was a dirty nigger and ought to be ashamed of herself, as alleged in folios 18 and 19 of complaint.

30. That later, on said 21st of March, 1890, at Louisville, defendant and his father, John M. Atherton, went to plaintiff's room and said in presence of defendant, and with his apparent approval, that he had come to hear what plaintiff had to say, and be a witness for his son; that the plaintiff was a nice kind of wife, and used other insulting expressions; that defendant and his father followed plaintiff and her sister into another room and defendant's father said among other things to the plaintiff that he would turn her a disgraced woman into the streets; that he would take her child away and keep it; that the plaintiff was a nasty woman and not fit to take care of her child and they would take it away, and falsely charged that she had accused his son of an unnatural crime; that plaintiff told him she did not know what he meant, and denied having accused his son of anything wrong; whereupon he said in the presence of defendant and with his apparent approval that the plaintiff was a dirty thing, and did not love her husband, and was jealous and mean, and that he would turn her out of the house and take away from her her child; that thereupon plaintiff said that she would not listen to such talk and started towards the door, when defendant seized her and pulled her back and said, "Damn you, you shan't go, you shall listen." That in so seizing the plaintiff the defendant greatly hurt her, etc., as alleged in folios 20, 21, 22, and 23 of the complaint herein.

403 31. That in April, 1890, and about the 18th, at Louisville, the defendant, without just cause or reason, became angry

with plaintiff and found fault with her dressing, and, among other things, said plaintiff was slovenly and repulsive, a dirty slouch and nasty nigger and not fit to touch, and that she was worse than a nigger wench, as alleged at folio 24 of the complaint.

32. That about April 23, 1890, at Louisville, when plaintiff was sick, defendant expressed disgust at her condition and said she was a nasty cat, dropping offal about and was a disgusting, dirty creature, as alleged at folio 24 of the complaint herein.

33. That on or about May 6, when plaintiff's sister was about to take the cars at Louisville, defendant told her she was a hypocrite and pushed plaintiff towards the train and said she had better go with her sister, as nobody wanted her; that plaintiff said to him, referring to their child, that he knew what was at the house; and the defendant said if the baby was all she thought of she had better clear out, as he did not want her, as alleged at folio 25 of complaint.

34. That at that time, and frequently during the month of May, 1890, the defendant, in Louisville, called the plaintiff a liar, as alleged at folio 26 of complaint.

35. That during the month of May, 1890, and afterwards, the fits of temper grew more frequent and he frequently threatened the plaintiff to divorce her, and said the baby was the only tie between them, and he would take it away and leave the plaintiff. That in said May, at Louisville, defendant reproached plaintiff for looking sad when their child was ill, and said that the plaintiff had so dissagreeable a face and looked so glum he could not bear to look at her, and she had no right to look as she did even though the child was sick, as alleged at folios 26 and 27 of complaint.

404

36. That in June, 1890, defendant said plaintiff should not go to her sister's wedding, or if she did go she should not take the baby and should not come back; that her family had insulted him by objecting to his treatment of her when the child was born, and that she should never take the child to them; that they were vile and miserable, and that plaintiff had no love for him or she would hate her family as he did, as alleged at folios 27 and 28 of complaint herein.

37. That in June, 1890, at Cresson, Pa., defendant, on several occasions, without just cause, became very angry and scolded and abused the plaintiff and frightened her so that she was constantly in fear that he would strike her; that he shook his fist at her and said she was a dirty nigger, and repeated his threats theretofore made that he would divorce her; that she was a false wife and had no respect or love for him, or she would not want to go to her sister's wedding or to her family, who were vile and low-lived, and that he would divorce and disgrace her; that she was a nasty thing and an indecent woman, and was not fit to have her child with her, as alleged in folios 28, 29 and 30 of the complaint herein.

38. That in September, 1890, defendant got in a great passion in New York, dismissed the nurse, said plaintiff had got the nurse as a spy, and that she was a bad mother, lazy and useless, and should take care of the baby alone, as alleged at folios 30 and 31 of the complaint.

405 39. That in November and December, 1890, at Louisville' defendant on several occasions, without reason or provocation, became very angry, &c., said plaintiff did not love him, she was only his mistress, was no wife; that he never asked her to marry him, but that she ran after him, and that she was nothing but a common woman; that he was so violent in his manner and language she was in great fear he would do her bodily injury; that in June, 1891, he renewed his threats of getting a divorce; that she could go home, but that she must not take her child, and she should never have her any more, as alleged at folios 31, 32 and 33 of complaint.

40. That on or about June 13, 1891, at Louisville, defendant and father came to plaintiff and ordered her to listen; that defendant said in the presence of his father that they were going to take her child away; that she was not fit to have her, and was a bad woman and unfit to have a child; that they were going to turn her off; that he would not live with her another hour; that they would take away her child and turn her out, and prevent her from ever seeing her child; that plaintiff said she did not think they could take away her child; that they said she would find out that they could, and the law would allow them to do so, and she had better consult a lawyer if she did not believe them; that defendant said they would give her a day to decide if she wanted to go home quietly and leave the child; that he did not care how soon she went, but she should not take the child out of the house. The plaintiff was greatly frightened, father and son being very violent in their manner and language, and she feared that they intended to attempt to take her child from her and never allow her to see it again, as alleged in folios 33, 34, 35 and 36 of the complaint.

406 41. That about June 14, 1891, at Louisville, defendant said to plaintiff he should proceed to divorce her in autumn and make his arrangements for that; that plaintiff said if he meant to do that to begin then and not wait till autumn; that she did not want it hanging over her all summer; that it would torture her; that defendant replied she ought to be tortured as much as a man could, and he would torture her; that an indecent woman like her ought to suffer, as alleged at folios 35 and 36 of complaint.

42. That in September, 1891, at Louisville, defendant treated plaintiff rudely and with great disrespect before his family and servants, as alleged at folio 38 of complaint.

43. That about October 2, 1891, at Louisville, defendant, without any cause, &c., became very angry and said he was going to cut her allowance down; that he would not pay any bills she would make; that he wished the baby well dressed; that he would pay bills made for baby, but did not care whether plaintiff had dresses or not; that he did not care what she wore, and she could wear her nightdress in the street for all him; that she had pretended to spend money for the baby, but had spent in for herself, and had sent it to her family, and he would not stand it any longer, as alleged at folios 37, 38 and 39 of complaint.

44. That about October 3, 1891, at Louisville, defendant, without any just cause, &c., became very angry with plaintiff and said the

food she provided for the baby was not fit for a pig to eat; that she knew nothing of the care of a child and was not fit to have her; that the court should decide if a woman as foul as she was should keep a child; that he had made arrangem-ts to take the child away
407 from her and that she should never see her again; that she was not fit to keep her; that thereupon defendant seized and tore the child from the arms of the plaintiff and violently took hold of the plaintiff and pushed her through the door and out of the room, injuring her arm and shoulder and locked the door against the plaintiff; ordered the nurse to pick up the baby's clothing and get ready her hat and cloak, as he intended to take her away; that in the presence of his mother she went up to defendant and put her hand upon his arm and begged him to live in peace with her and treat her well, and as a wife should be treated; that defendant roughly flung her from him and said no, he would as soon touch a snake, as alleged at folios 29, 40, 41 and 42 of complaint.

45. That defendant, after plaintiff left the house of defendant, October 3, 1891, and he found where she was, went to her and angrily ordered her to return home; that plaintiff said she would go back if he would promise her and give her assurance that he would cease his abuse and treat her well and as a wife should be treated; that defendant refused to make any such promise or to give her any such assurance, but angrily said to the plaintiff, "Damn your assurance. I will give you one more chance to be a decent woman. If you don't come back in two hours I will send the sheriff after you and have you dragged back in disgrace," or words to that effect, as alleged at folios 39, 40, 41 and 42 of the complaint. *Refused. P. B. M., J. S. C.*

46. That the allegations of the complaint charging cruel and inhuman conduct of the plaintiff by the defendant are unproven. *Refused. P. B. M., J. S. C.*

Requests to Find as Conclusions of Law.

1. That the complaint herein be dismissed, the plaintiff
408 having failed to prove a cause. *Refused. P. B. M., J. S. C.*

2. That the separation agreement of October 10, 1891, was valid and binding on the parties thereto. *Refused. P. B. M., J. S. C.*

3. That the judgment of divorce entered in the State of Kentucky, March 14, 1893, was and is valid, and dissolved the marriage relation between the parties to this present action. *Refused. P. B. M., J. S. C.*

4. That the court of Kentucky had jurisdiction of the parties to the action for divorce, and of the subject-matter of said action. *Refused. P. B. M., J. S. C.*

5. That said judgment in said action for divorce, entered March 14, 1893, is a bar and defense to this present action. *Refused. P. B. M., J. S. C.*

6. Judgment is therefore ordered in this present action in favor of the defendant and against the said plaintiff. *Refused. P. B. M., J. S. C.*

Supreme Court.

MARY G. ATHERTON
against
PETER LEE ATHERTON.

Exceptions of the Defendant to the Refusals of the Court Herein to Find the Requests on the Part of the Defendant.

1. The defendant excepts to the refusal to find the seventh request.
2. The defendant excepts to the refusal to find the ninth request.
409 3. The defendant excepts to the refusal to find the fourteenth request.
4. The defendant excepts to the refusal to find the sixteenth request.
5. The defendant excepts to the refusal to find the seventeenth request.
6. The defendant excepts to the refusal to find the eighteenth request.
7. The defendant excepts to the refusal to find the 19th, 20th, 21st, 22d, 23d, 24th, 25th, 26th, 27th, 28th, 29th, 30th, 31st, 32d, 33d, 34th, 35th, 36th, 37th, 38th, 39th, 40th, 41st, 42d, 43d, 44th, 45th, and 46th requests.

Exceptions to the Refusals to Find Conclusions of Law as Requested by Defendant.

1. The defendant excepts to the refusal to find the first conclusion of law as requested.
2. The defendant excepts to the refusal to find the second conclusion of law as requested.
3. The defendant excepts to the refusal to find the third conclusion of law as requested.
4. The defendant excepts to the refusal to find the fourth conclusion of law as requested.
5. The defendant excepts to the refusal to find the fifth conclusion of law as requested.
6. The defendant excepts to the refusal to find the sixth conclusion of law as requested.

To the clerk of the county of Oneida and W. & N. E. Kernan, plaintiff's attorneys.

SETH C. ADAMS,
Attorney for Defendant,
Utica City National Bank Building, Utica, N. Y.

410 Supreme Court, Oneida County.

MARY G. ATHERTON, Plaintiff,
ag'st
PETER LEE ATHERTON, Defendant.

GENTLEMEN: Please take notice that the defendant herein appeals to the general term of the supreme court of the fourth judicial department from the judgment herein, and all parts thereof, entered in the Oneida county clerk's office January 8th, 1894.

January 13th, 1894.

To the clerk of the county of Oneida and W. & N. E. Kernan, plaintiff's attorneys.

SETH C. ADAMS,
Defendant's Attorney,
Utica City National Bank Building, Utica.

Supreme Court, Oneida County.

MARY G. ATHERTON
vs.
PETER LEE ATHERTON. } Opinion of Judge McLennan.

This action is brought by the plaintiff to obtain a decree of divorce *a mensa et thoro*, alleging cruel and inhuman treatment on the part of the defendant. The answer denies the allegation, and as a further defense sets up a decree of divorce *a vinculo*, obtained in the courts of the State of Kentucky, and pursuant to the laws of that
411 State, upon the ground that the plaintiff had abandoned the defendant without fault on his part. In that action no personal service was made upon the plaintiff within the State of Kentucky, and she did not appear therein, she being at the time within the State of New York.

In addition to the issue of fact raised by the pleadings, the force and effect of the decree obtained in the Kentucky court must be determined, whether or not it is a bar to this action. At the time when the plaintiff left defendant and left the State of Kentucky, or soon thereafter, the parties made and entered into an agreement of separation, and providing for the custody of a child born of the marriage, and the amount which the defendant should pay for its support and for the support of the plaintiff. The validity, force and effect of that agreement is also the subject of contention between the parties, as is also the custody of the child.

W. & N. E. Kernan, for plaintiff.
Hon. A. M. Mills, of counsel.
Seth C. Adams, for defendant.
Hon. A. M. Beardsley and *Hon. A. M. Humphrey*, of counsel.

MCLENNAN, *J.*:

The plaintiff, for many years a resident of the State of New York, having resided with her parents in the village of Clinton, Oneida

county, was married to the defendant, a resident of the State of Kentucky, he having resided with his parents in the city of Louisville, in said State, on the 17th day of October, 1888, at her home in said village of Clinton. After the marriage, and after quite an extended wedding tour, the plaintiff went with the defendant to his home in the city of Louisville, and there continued to reside with him, as husband and wife, during all the time substantially until the
412 month of October, 1891. At that time the plaintiff left the home and residence of her husband, and returned to the home of her parents in the village of Clinton, N. Y., taking with her the little girl, Mary V. Atherton, who had been born to them in January, 1890, then about twenty months old. From the time when the plaintiff so left the defendant until the present she has resided with her mother in the village of Clinton, in the State of New York.

The plaintiff claims to have left the defendant on account of his cruel and inhuman treatment of her. He contends that she left him without excuse and without any fault on his part. After the plaintiff left the home of the defendant, and while she and her child were residing with her mother in the village of Clinton, and on or about the month of December, 1892, the defendant commenced an action in the Jefferson circuit court, law and equity division, of the State of Kentucky, by filing his petition praying for a judgment divorcing him from the bonds of matrimony with the plaintiff, alleging and upon the ground that she, in the month of October, 1891, without fault on his part, had abandoned him, and that such abandonment had continued without interruption for the period of more than one year. By the petition he also asked that proper provision be made for the care and custody of the little girl, the only issue of the marriage. The petition was not served upon this plaintiff within the State of Kentucky, and she did not appear in the action or proceeding; and an attorney and counselor of the circuit court of Kentucky was appointed to appear and defend for her, as a non-resident, pursuant to the provisions of the statutes of that State in that regard. Thereafter such proceedings were had that on or about the 14th day of March, 1893, a decree was made and entered in the Ken-
413 tucky court dissolving the bonds of matrimony between the parties to this action.

The Jefferson circuit court of the State of Kentucky had jurisdiction of the subject-matter of the action, and evidence was produced which, under the statutes of that State, the court considered, entitled the plaintiff in that action to the relief prayed for in his petition. All the forms of law were strictly complied with, and a judicial determination was made, after considering the evidence and circumstances presented, dissolving the marital relations existing between the parties to that action. The court decided that this plaintiff had abandoned the defendant without fault on his part, and that being a ground for absolute divorce under the laws of the State of Kentucky, rendered judgment accordingly.

Was that judgment so rendered binding and conclusive upon the plaintiff in this action? If it was, she cannot succeed here. As before said, it is contended on behalf of the plaintiff, that at the time

of the commencement of the action in Kentucky, and during its pendency, she was, and ever since has been, and now is, a resident of and a citizen of this State; and that therefore, the courts of Kentucky did not and could not acquire jurisdiction of her, she not having voluntarily submitted to the jurisdiction, and not having been served with process, and that the decree thus made by the court of the State of Kentucky had no binding force or effect upon her within this State.

The force and effect to which such a decree is entitled in this State is now thoroughly well settled by the decisions of its highest court. In *Williams vs. Williams*, 130 *N. Y.*, 193, the court says (Brown, *J.*, writing the opinion), adopting the language of the court in
414 the case of *Jones vs. Jones*, 108 *N. Y.*, 415: "The marriage relation is not a *res* within the State of the party invoking the jurisdiction of a court to dissolve it, so as to authorize the court to bind the absent party, a citizen of another jurisdiction, by substituted service of actual notice of the proceedings given without the jurisdiction of the court where the proceeding is pending." It is held in that case (quoting the syllabus), that "a judgment of divorce rendered in another State against a resident of this State, where there has been no personal service of process within the State rendering it, and no personal appearance by the defendant in the action, is inoperative and void in this State." And also that, "a State may adjudge the status of its citizens towards a non-resident, and so long as the operation of such a judgment is kept within its own confines, other States must acquiesce, but it has no effect beyond the limits of the State." So far as ascertained, the above is the latest declaration of the court of appeals upon the question now being considered.

In *Rigney vs. Rigney*, 127 *N. Y.*, 408, Follett, *Ch. J.*, writing the opinion, it is held: "The courts of the United States, and those of most of the several States, including New York and New Jersey, hold a divorce to be valid, so far as it affects the marital status of the plaintiff, which is granted by the courts of a State pursuant to its statutes, to one of its resident citizens in an action brought by such citizen against a resident citizen of another State, though the defendant neither appears in the action nor is served with process in the State wherein the divorce is granted. * * * But the courts of this and some of the States hold that the marital status of such non-resident defendant is not changed by such a judgment so recovered, he or she remaining a married person."

415 In *De Meli v. De Meli*, 120 *N. Y.*, 485, the court says: "But a court has no extraterritorial jurisdiction, and a person not domiciled in the State or country cannot be charged *in personam* by adjudication there, unless he is personally served with notice or process within it, or voluntarily submits himself to the jurisdiction of its court by appearing in some manner in the action or proceeding sought to be instituted against him."

In that case the husband brought an action of divorce in Germany, where he then was, against his wife, and the court says: "Assuming that the wife's domicile was not in that country at the time the suit

there was instituted, the court had no jurisdiction of her person, and the judgment as against her was a nullity."

In *Jones v. Jones*, 108 *N. Y.*, 415: A wife residing in Texas brought an action for divorce in that State against her husband, he being a resident of the State of New York. The petition was served upon him in this State. It was held that the decree rendered would not have any binding force or effect as to him if he had not voluntarily appeared in the action pending in the Texas court.

The case of *Cross v. Cross*, 108 *N. Y.*, 628, was an action brought to obtain a limited divorce on the ground of abandonment. A decree of divorce obtained by the defendant in the State of Illinois was put in evidence by him as an answer to the plaintiff's cause of action. It was held void as to her. The court says (*Finch, J.*, writing the opinion): "When it (the decree) was rendered and during the pendency of the suit, the defendant therein was domiciled in this State, was not served with process, did not appear in the action and had no actual notice of its existence until a copy of the final decree was served upon her.

416 "The case of *People v. Baker*, 76 *N. Y.*, 78, and *O'Dea v. O'Dea*, 101 *id.*, 23, are decisive upon this point, and bar the further discussion to which the appellant invites us." The fact that in the case above cited the plaintiff did not have actual notice of the pendency of that action until the decree was made cannot be important as conferring jurisdiction upon the Illinois court. In the same case it is also held that the jurisdiction of the Illinois court was open to assault in spite of the recitals in the judgment, "and so it was competent to question the truth of the foreign residence," citing *Kerr v. Kerr*, 41 *N. Y.*, 272.

In *O'Dea v. O'Dea*, 101 *N. Y.*, 23, it appears that the defendant, a resident of Toronto, Canada, came into the State of New York and married one K., and after the marriage they resided for several years in this State as husband and wife. The defendant then left K. and returned to Toronto, where she continued to reside. K. removed to the State of Ohio and became a resident and citizen of that State. He then commenced an action of divorce in an Ohio court having jurisdiction of the subject-matter, against the defendant, on the ground that she had been willfully absent from him for more than three years, which was ground for absolute divorce under the laws of the State of Ohio. A copy of the petition was personally served upon the defendant in Toronto, where she resided, and she had actual knowledge of all the proceedings, but did not in any manner appear in the action. All the provisions of the laws in the State of Ohio relating thereto were complied with, and a decree was made dissolving the marriage relation between the parties in accordance with the statute, and restoring each party to the rights and privileges of unmarried persons. It was held that the Ohio court

417 acquired no jurisdiction over the defendant, and that the decree of divorce so rendered was, as to her, inoperative and void.

If it be assumed that the plaintiff in the case at bar was not a resident of the State of Kentucky when the action of divorce was

commenced against her by her husband, it will be found impossible to distinguish it, upon principle, from the case last above cited. The fact that the plaintiff here, previous to the commencement of the action by her husband, had been a resident of Kentucky is unimportant, if she had ceased to be a resident at the time when the action there was commenced.

It is true, as suggested by defendant's counsel, that the O'Dea case, above cited, was decided by a divided court; but it is not the law of this State, and of the same force as if pronounced by a unanimous court as to all questions decided. Further, it may be said that in nearly every case to which attention has been directed since decided by the court of appeals, that case has been cited with approval and followed.

The *People v. Baker*, 76 *N. Y.*, 78, was a case in which the defendant married a woman in the State of Ohio; they resided together and became residents of that State after such marriage. Subsequently Baker left his wife and became domiciled in the State of New York. She then brought an action of divorce against him on the ground of gross neglect, and such proceedings were had, all in strict compliance with the laws of the State of Ohio, that she obtained a judgment dissolving the marriage relation between her and him, and permitting either party to marry again. No personal service was made upon Baker within the State of Ohio, and he did not appear in the action. After such judgment was rendered
418 by the Ohio court, Baker married again in the State of New York. He was indicted for bigamy in this State and convicted; and the conviction was sustained by the court of appeals, holding that the judgment of divorce rendered by the Ohio court was void as to him; that he not having submitted to the jurisdiction of the Ohio court, it could not impose any obligations upon him which could be effective or enforced in this State, and that its judgment could not afford him any protection.

Can it be doubted that if the plaintiff in this case should rely upon the judgment rendered by the Kentucky court as fixing her status, and should marry again in this State, that she would be guilty of the crime of bigamy under our laws? Such act on her part would concededly be lawful in Kentucky, and would be lawful on the part of the defendant; such act on her part, according to our laws, would be illegal everywhere except in the State of Kentucky.

In *Hunt v. Hunt*, 72 *N. Y.*, 217, relied upon by defendant's counsel, substantially the same doctrine is held; but in that case it was found by the court at special term in this State, that at the time of the commencement and during the pendency of the action in the State of Louisiana the defendant in that case was a resident of that State, and therefore, and upon that ground, the judgment of Louisiana court was held to be binding as against such part-.

All the cases decided by the court of appeals of this State to which attention has been called have been considered thus at length because of the stress laid upon them by each of the able counsel, and

because of the very elaborate arguments and briefs made and submitted upon the question by them respectively.

419 However unfortunate it may be that the laws of the different States affecting the marriage relation are in conflict, the only province of this court is to ascertain and declare the law as it is in this State. It would seem to be beyond question that in an action for divorce brought in another State against a party not domiciled there, and upon whom no personal service was made in such State, and where there was no appearance of the party in that jurisdiction, that any judgment rendered in such action is null and void as to the party not so served and not appearing; and that, although binding upon the party bringing the action, such judgment does not in any manner change the status of the party domiciled and residing in another jurisdiction.

Was the plaintiff domiciled within and a resident and citizen of this State when the proceedings for divorce were commenced against her in the Kentucky court, and during the pendency of those proceedings? In legal phraseology, residence is synonymous with inhabitancy or domicile, and persons having that relation to this State are its citizens and residents. (*De Meli v. De Meli, supra.*)

After a residence of about three years in the State of Kentucky with her husband, and in October, 1891, the plaintiff left her home and the State of Kentucky, taking her child and all her belongings with her, and came to the home of her mother in the village of Clinton, N. Y., clearly upon the evidence with the purpose and intention on her part not to return to that State, but to permanently reside in this State. That such was her intention, and that it was thoroughly understood by the defendant, is clearly evidenced by the agreement before referred to, entered into between the

420 plaintiff and defendant. That agreement provided, among other things, that during a portion of each year the child should reside with the defendant in this case, and that during the balance of the year it should be absent from him and reside with the mother, this plaintiff. It provided for conveying the child from the residence of the mother to the residence of the father, and *vice versa*. It will not be contended that it was not understood that the residence of the plaintiff, and of the child when absent from the father, contemplated by the agreement, was the village of Clinton, in the State of New York.

As before said, in December, 1892, more than a year after the plaintiff had left the State of Kentucky, and during all of which time she had resided in this State, the action in question was commenced in that State; and upon the facts stated in his petition or complaint in that case an order was made reciting that this plaintiff (the defendant in that action) was a non-resident of the State of Kentucky, and appointing an attorney of that court to appear and defend for and on behalf of said non-resident defendant, this plaintiff. Thereafter, and in the month of March, 1893 (the plaintiff during all of that time having continued to reside in the State of New York), the judgment in question was entered.

As before said, it is fully established that the plaintiff, more than

a year prior to the commencement of the action in Kentucky, left that State and came to the State of New York, with the intention of making the latter State her permanent residence, and that the defendant fully understood it, and by the agreement which he entered into assented to it; and that such intention and residence on the part of the plaintiff continued during the pendency
421 of such action, and still continues, is equally well established.

The question is, therefore, narrowed to this: Was the plaintiff at the time of the commencement of such action in Kentucky, and during its pendency, a citizen of the State of New York?

It is true that the residence of the husband is *prima facie* the residence of the wife; but that she may acquire and have a residence separate and distinct from his is equally true. In the case of *Hunt v. Hunt, supra*, the court says: "The domicile of the husband is *prima facie* the domicile of the wife. * * * There are, however, exceptions to the rule. * * * So that in certain cases a married woman may have a domicile in another jurisdiction from that of her husband. This is so when they are living apart under a judicial decree of separation, or where the conduct of the husband has been such as to entitle the wife to a decree of limited divorce. She may acquire a separate domicile whenever it is necessary for her to do so." In that case, as before said, the court at special term inquired into the facts, notwithstanding that they had been passed upon by the court in the foreign jurisdiction, to ascertain whether the case came within the exception above referred to, and its conclusion was approved by the appellate court. By force of the agreement entered into, the domicile of the husband ceased to be *prima facie* the domicile of the wife. It ceased to be with him, and the necessity arose for her to make it elsewhere.

In this case, so far as the question of the plaintiff's residence at the time of the commencement of the Kentucky action is concerned, it is not necessary to inquire whether she had cause for leaving the home and domicile of her husband; she had then left it
422 pursuant to the terms of an agreement signed and sealed by him. It is not necessary to traverse the issue passed upon *ex parte* by the Kentucky court, for, as we have seen by the agreement made and entered into by the parties to this action, prior to the bringing of the action in that court, it was stipulated, in substance, that the plaintiff in this case should have a residence and domicile separate and apart from her husband, viz., in the State of New York, as must be found from all the circumstances and the then situation of the parties. It can hardly be contended that of such was the agreement and its effect, and the plaintiff came to this State and remained here pursuant to it, and with the intention of permanently residing here, that she did not come within the exceptions mentioned by Judge Folger in *Hunt vs. Hunt, supra*, quite as much as if a judicial decree or separation had been entered against her before she left her husband's domicile and the State of Kentucky. It follows that at the time the action for divorce was commenced against the plaintiff in the State of Kentucky and during its pendency, she was domiciled in and a resident and citizen

of the State of New York; and no personal service having been made upon her within the State of Kentucky, and not having appeared in the action, the judgment rendered in that action was inoperative and void as to her, and is no bar to this action.

This leads to a consideration of the facts disclosed by the evidence in this case, to determine whether the treatment of the plaintiff by the defendant was cruel and inhuman, and of such a character as to entitle the plaintiff to the relief demanded in the complaint. This court being clothed with jurisdiction, it becomes its duty to determine that question upon all the evidence submitted to it, and independent of the *ex parte* finding of the Kentucky court.

423 In order to properly determine that question, the daily life of the parties to this action for a period of three years, the history and even the details of their entire married life, must be examined.

When twenty-two years of age, the plaintiff, a lady of culture and refinement, married the defendant, but little older than herself, a gentleman of fortune and also of culture and refinement. She left her home, where she was surrounded by tender and loving influences, and went with him to their new home, where apparently every detail was arranged solely with a view to the comfort and happiness of the two. Soon, however, differences arose, unimportant at first, sometimes the fault of one and sometimes of the other. Apparently the defendant soon became impressed with the notion that his wife did not have proper regard and affection for him; that when she married him she was deceived as to his condition of health; became dissatisfied with the relations existing between her and other members of her family; and for other assumed causes commenced to treat her cruelly soon after their marriage, and continued such course, increasing in extent, during their entire married life, until he finally drove her from him. He charged her upon repeated occasions with being "unloving, unnatural, indecent, nasty, a dirty, nasty thing, worse than a nigger;" that she was no wife, and used many other names of and concerning her of a like character. On several occasions he threatened to divorce her, to take her child from her, spoke insultingly to her of and concerning her family; frequently he became very angry with her; talked in a loud, excited, boisterous, and abusive manner, not only when she was alone with him, but in the presence of others; and at times when she was ill as well as when she was well, his treatment was such as to cause her to weep bitterly, to become nervous and excited; was

424 such as to keep her in almost a constant state of fear; and was such as to make it dangerous to her health to continue to live with him. The evidence does not disclose any act or omission on the part of the plaintiff to justify the treatment which she received at the hands of the defendant. That she wished to visit her people too often and remain with them too long is suggested. A remark made by her to the effect that when she married the defendant she was deceived as to his *his* health, is quoted. That her family did not treat him with proper respect is charged. That she did not properly appreciate and understand the marriage relation

and the duty of a wife and mother, was often said to her. But nothing appears which would seem to justify a course of conduct on the part of the defendant such as is disclosed by the evidence, the inevitable result of which would be to drive his wife from him or else make her smother every instinct of self-respect. That the plaintiff many times attached too much importance to the defendant's exhibition of anger is doubtless true; and undoubtedly she many times misinterpreted his acts and words and did not strive as she ought, to forgive and forget. But, all in all, his course was such as to justify her in the conclusion that he had no affection or regard for her, and that he desired to be freed from her. This he often declared by word as well as by action.

When the final scene came to be enacted, when the wife and mother fled from her home of luxury, leaving all behind save her child, and sought the protection of neighbors, no words of pleading came from him. When brought face to face with the stern reality that his wife, the mother of his child, had gone, he did not say, "Come," but instead coldly and deliberately said, "Go," and said it over his seal and signature. No sugges-
425 tion is made that there was any improper thought or relation on the part of the wife; no suggestion that she had any one to whom she desired to go except her mother; and yet she left this home of luxury? Why? Because she was treated with love and affection? Upon the evidence it is concluded that she so left because the treatment which she had received was cruel and inhuman, within its legal definition and meaning. Such was the situation then. What was the situation when this action was commenced? The wife concededly virtuous, the mother concededly pure, who had left her home, we will assume, without sufficient cause, without being given an invitation to return, is divorced by the act of the defendant; by his act the marriage relation between them is declared to be at an end, not for a day but forever. He obtains a judicial decree which declares that she, the plaintiff, from that time forward shall be no more to him than any other woman; which makes it impossible for the father and mother to live together with their child. It is considered that the institution of such proceeding and obtaining such judgment on the part of the defendant, under the circumstances of this case, was in and of itself cruel and inhuman treatment of the plaintiff by the defendant, and if necessary a judgment of separation might be based upon that act alone. But it is not necessary. Wholly independent of it, the evidence fully established the fact that the defendant was guilty of cruel and inhuman treatment of the plaintiff.

It would not be useful here to detail the acts and omissions on the part of the defendant which were established by the evidence to be cruel and inhuman within the meaning of the authorities. Sufficient to say that after a most careful examination of the
426 evidence, and where conflicting, weighing it, and after considering all the circumstances, the conclusion is reached that the plaintiff is entitled to a judgment of divorce *a mensa et thoro*.

The care and custody of the child of the parties to this action is

and should be a subject of most serious consideration. She certainly is innocent of any fault, and her interests are vastly more important than are those of either of the parties. It is not considered that the agreement before referred to made between the parties can have any binding force or effect in that regard, and that such determination should be made as under all the circumstances would be best for the child.

It is suggested that the defendant has large wealth, and that he has every facility for providing a home of luxury, comfort and refinement for the child is not doubted.

That the mother is also well qualified to properly care for, educate and bring up the child is conceded. She resides with her mother in a comfortable home, in the village of Clinton, N. Y., accessible to educational facilities; a place of culture and refinement. That both are equally attached to the child and would do their utmost to promote its best interests is apparent. Ordinarily the terms of the agreement above referred to, which provides in substance that during a portion of each year the child shall be in the custody of the mother, and during the balance of the year with the father, would be followed in this case. But upon serious reflection, it is thought not to be proper to make it obligatory upon the plaintiff to surrender her child, not to her husband, but, so far as the laws of the domicile of the defendant are concerned, to a stranger; it is not thought proper to send the little girl to a home where "wife" is not known, or where it, perchance, may not mean "mother" also.

427 When the agreement referred to was made, "wife" and "mother" meant the same to these parties. That is now wholly changed as to the defendant, and by his act. It is believed that it will be better for the child now, as she grows older, to remain in a home and in a jurisdiction where, to her, "father" and "husband" shall mean the same, and where "wife" and "mother" shall be the same, and shall continue to mean the same so long as both the parties to this action shall live.

Entertaining these views, it follows that the care and custody of the child must be awarded to the plaintiff, the defendant to have the right to see her and to visit her at all reasonable times.

Judgment may be entered in favor of the plaintiff, separating her from the defendant, and from his bed and board forever, and awarding to her the care and custody of the child, Mary V. Atherton, the only issue of the marriage. The provisions which the judgment will contain respecting alimony, costs and counsel fees are indicated in the findings.

I hereby certify that the foregoing is the case and exceptions as settled herein, and I direct and order that the same, or a printed copy of the same, be filed in the Oneida county clerk's office, and that the same be annexed to the judgment-roll.

P. B. McLENNAN, *J. S. C.*

We hereby certify that the annexed copy of the case as settled herein is correct, and is a correct transcript of the said case and the

papers composing the same, on file in the county clerk's office of the county of Oneida.

W. & N. E. KERNAN,
Plaintiff's Attorneys.
SETH C. ADAMS,
Defendant's Attorney.

428 Supreme Court, State of New York.

At a general term of the supreme court, held at the court-house in the city of Syracuse, Onondaga county, in and for the fourth judicial department of the State of New York, on the 20th day of Nov., 1894.

Present: Hon. George A. Hardin, presiding justice; Hon. Celora E. Martin, Hon. Milton H. Merwin, associate justices.

MARY G. ATHERTON, Resp't,
vs.
PETER LEE ATHERTON, App'l't.

Judgment modified by striking therefrom "the sum of $1,000 counsel fee allowed" and so modified affirmed with costs to the respondent against the appellant.

Opinion by Hardin, P. J.

A true copy.
[L. S.]

JAS. E. HUBBELL,
Sp. Dp. Clerk.

Original filed Jan. 14th, 1895, in Oneida Co. clerk's office.

Please take notice that the within is a copy of a judgment duly made and entered in the within-entitled action, and this day duly filed in the office of the clerk of Oneida county.

Dated Utica, N. Y., Jan. 14, 1895.

Yours, &c., W. & N. E. KERNAN,
Attorneys for Pl'ff and Resp't.

To Seth C. Adams, Esq., attorney for def't and app't.

429 Supreme Court.

MARY G. ATHERTON, Plaintiff and Respondent, *against* PETER LEE ATHERTON, Defendant and Appellant.	Judgment of the 14th Day of January, 1895.

The appeal taken by the defendant in the above-entitled action, having been heard at a general term of the supreme court, held at Utica, in and for the fourth judicial department, commencing on the 11th day of September, 1894, and an order of said general term having been made and entered, modifying the judgment of the supreme court, entered in said action on the 8th day of January, 1894,

in the county clerk's office of Oneida county, by striking therefrom "the sum of one thousand dollars, counsel fee allowed," and so modified, affirming said judgment with costs of the said appeal to the respondent:

Now, on motion of W. & N. E. Kernan, attorneys for the respondent—

It is hereby adjudged that the said judgment appealed from be, and the same is hereby modified by striking therefrom "the sum of one thousand dollars, counsel fee, allowed," and, as thus modified, be, and the same is hereby affirmed, and that the respondent, Mary G. Atherton, recover from and against the appellant, Peter Lee Atherton, the sum of one hundred seventeen dollars and forty cents, costs of said appeal.

Judgment-roll filed and judgment signed, entered and docketed this 14th day of January, 1895, at 12.25 p. m.

G. A. WILLARD, *Clerk.*

Original filed January 14th, 1895, in Oneida county clerk's office.

430 Supreme Court.

MARY G. ATHERTON, Respondent,
against
PETER LEE ATHERTON, Appellant.

GENTLEMEN: Take notice, that the appellant, Peter Lee Atherton, appeals to the court of appeals from the judgment of the supreme court, herein entered in the clerk's office of the county of Oneida, on the 14th day of Jan., 1895, affirming a judgment entered in Oneida county clerk's office for $229.30 costs and equitable relief.

The appellant intends to bring up for review upon such appeal the judgment of affirmance.

Dated Jan. 15, 1895.

Yours, &c.,

SETH C. ADAMS,
Attorney for the Appellant.

Office and post-office address, Mann building, Utica, New York.

To the clerk of the county of Oneida, and to W. & N. E. Kernan, attorneys for the respondent.

(Endorsed:) Personal service of the within notice of appeal admitted Jan. 18, 1895.

W. & N. E. KERNAN,
Plaintiff's Attorneys.

431 Supreme Court.

MARY G. ATHERTON, Resp't,
ag'st
PETER LEE ATHERTON, Apllt.

It is stipulated by all the parties interested, pursuant to section 3301 of the Code of Civil Procedure, that the foregoing are severally true copies of the judgment-roll on appeal to the general term, with the decision, order and judgment of affirmanee therein. Also notice of appeal from said judgment to the court of appeals, and the indorsement thereon are transcripts of the whole of the originals thereof severally.

Dated Jan. 18, 1895.

W. & N. E. KERNAN,
Att'ys for Pl'ff and Resp't.
SETH C. ADAMS,
Attorney for Defendant and Appellant, Utica, N. Y.

General Term, Fourth Department.

MARY G. ATHERTON, Respondent,
vs.
PETER LEE ATHERTON, Appellant.
Argued Sept., 1894; Decided Nov., 1894.

Before Hardin, P. J., Martin, J., Merwin, J., Associate Justice.

Appeal from a judgment entered in Onondaga county upon a decision made by the court after a trial at special term ad-
432 judging a separation of husband and wife; awarding alimony to the wife and providing an allowance for the support of their child, and awarding taxable costs and an allowance of $1,000 in favor of the plaintiff and against the defendant.

Alexander P. Humphrey and A. M. Beardsley, for appellant.
W. & N. E. Kernan and A. M. Mills, for respondent.

HARDIN, *P. J.:*

October 17th, 1888, at Clinton, the parties to the action intermarried and after spending a portion of their wedding trip in Utica and Old Point Comfort, they repaired to the city of Louisville, Kentucky, to make their residence with the parents of the defendant in that city, and they continued to live and cohabit together until the 3d day of October, 1891, when, after a distressful scene, in which violent language and excited and severe words were used between the parties, and the defendant had made a threat to take the infant child, which was born to them on the 8th of January, 1890, away from the plaintiff and to remove it from her care and supervision, and after she had remonstrated and sought to induce him by persuasion and by putting her arms around his neck and begging him to change his avowed purpose, and after he had resolutely, angrily and forcibly thrust her away from him, in the presence of his mother, she re-

paired to her room and taking the child went out of the residence of the defendant to Mrs. Belknap's, a neighbor, and remained there for two or three days and subsequently went therefrom to the Galt House hotel and remained for a period of about a week when her friends and counsel came to her; and during the period she was there at the Galt House an agreement was entered into, reciting that an actual separation had taken place; also reciting therein, viz: "The undersigned, Peter Lee Atherton, and his wife, Mary G. Ather-
433 ton, having ceased to live together as man and wife, without in any way acknowledging upon whom is the fault, or condoning the conduct of the one or the other, which has led to the existing state of affairs or preventing any consequences which may follow, or right which may arise to either party if such status shall continue, desire to provide for the best interest of their child, Mary Valeria Atherton." Upon the consummation of the agreement, the plaintiff with the child left the city of Louisville with the intent and purpose of ceasing to be a resident of the State of Kentucky and returned to the home of her mother in the village of Clinton, N. Y., and acquired a residence in Clinton where she has continued to reside down to the time of the trial of this action.

Article 3 of the Code of Civil Procedure contains several sections providing for "action for a separation." In section 1763 it is provided that such an action may be maintained * * * "2—Where the parties were married within the State, and the plaintiff is a resident thereof when the action is commenced." In section 1768 of the Code, it is provided, viz: "If a married woman dwells within the State, when she commences an action against her husband, as prescribed in either of the last two articles, she is deemed a resident thereof, although her husband resides elsewhere." The provisions of the statute to which reference has just been made seem to recognize the exception stated in *Hunt v. Hunt*, 72 *N. Y.*, 242, to the effect that a married woman may have a domicile in another jurisdiction than that of the husband, "when the conduct of the husband has been such as to entitle the wife to an absolute or limited divorce. She may acquire a separate domicile whenever it is necessary for her to do so. But the right to do so springs from the necessity for its exercise." Upon the evidence disclosed in the appeal book, as well as upon the law, it must be assumed that the plaintiff was
434 domiciled in the village of Clinton at the time of the commencement of this action, January, 1893, and had been so domiciled since her separation from her husband, which occurred in October, 1891. It was undoubtedly understood by the parties, at the time of the execution of the agreement as to the separation, that she should remove from the State of Kentucky to the State of New York and join her mother at the home in Clinton. And the evidence seems to indicate that the defendant not only had knowledge thereof, but acquiesced in such removal from the State of Kentucky to the State of New York by the wife. Extensive findings of fact have been made by the trial judge and he reaches the conclusion that a case is made out within the provisions of sections 1762 of the Code, and that the plaintiff is entitled to maintain the action because

of the acts and circumstances disclosed in the evidence by reason of the "cruel and inhuman treatment of the plaintiff by the defendant;" and "such conduct on the part of the defendant towards the plaintiff as may render it unsafe for the former to cohabit with the latter." When making the findings of fact the trial judge was called upon to review, consider and determine the force and effect of evidence relating to the acts, doings and conduct of the respective parties to and with reference to each other from the period of their marriage on the 17th of October, 1888, to the period of their separation, October 3d, 1891 (as well as some acts and circumstances thereafter), and to reach his after conclusions weighing the evidence in which there were very sharp and severe contradictions by the principal parties examined therein. Witnesses were called in behalf of the plaintiff tending to support much of her testimony, and witnesses were called in behalf of the defendant tending to support his version and narration of several of the important transactions that are disclosed in the evidence given by her, and tending to sustain the version of the conversations, acts and doings of the defendant as related
435 by him. Although a very extensive argument has been addressed to this court upon the subject of the credibility of the plaintiff as a witness in her narration of the scenes and events and misfortunes which attended her in her married life, and we are pressed to say that her statements thereof are "most uncandid," and that "strong side light is thrown" against her by letters written, and her testimony somewhat shaken by witnesses who speak in behalf of the defendant as to some of the important transactions that she relates, and in some of her statements we can see that she has been mistaken, and in others she has to some extent colored and magnified them, still, considering the evidence which tends to corroborate her and to some extent tending to establish important facts involved in the numerous inquiries that were opened at the trial, we are inclined to accept the conclusions of fact upon the essential features of the case as found by the trial court.

In Lutz *v.* Lutz, 31 State Rep., 718, which was an action for cruel and inhuman treatment, Van Brunt, P. J., said: "The judgment of the referee in respect to the credibility of witnesses who have been examined personally before him should not be lightly disturbed, in view of the fact that he has the advantage of the personal attendance of the witnesses, and has been enabled to judge by their demeanor and manner of testifying much in respect to their credibility. * * * Cruel and inhuman treatment does not necessarily imply such treatment as places a wife in physical fear of the husband. The conduct of the husband may produce such mental agony in the wife as to be even more cruel and inhuman than if mere physical pain has been inflicted, and where the conduct of the husband toward the wife is of this character it is certainly cruel and inhuman, and justifies the court in freeing her from the necessity of
436 submission to such treatment." Numerous cases are found in this State which construe the words "cruel and inhuman treatment," and which declare that "as great cruelty and as much inhumanity may be manifested," and which declare that acts and

words may be construed as cruel and inhuman, although they cause no physical pain. Bahin *v.* Bahin, 17 Abb.'s Pr. R., 26; Whispell *v.* Whispell, 4 Barb., 217; De Meli *v.* De Meli, 67 How., 32; S. C., affirmed, 120 N. Y., 485; Fowler *v.* Fowler, 33 State Rep., 746; Waltermire *v.* Waltermire, 110 N. Y., 183.

Upon the case presented at the special term it rested "upon a review of all his conduct toward her, and not upon any single act." Davies *v.* Davies, 55 Barb., 130; Bishop on Marriage, Divorce and Separation, vol. 1, sections 1561 and 1652.

While some of the early acts relied upon were apparently condoned, yet they were revived by subsequent acts of the defendant. In Burr *v.* Burr, 10 Paige, 20, it was held that condoned cruelty will be revived by subsequent acts of cruelty, which, of themselves, would not be sufficient to justify a separation. And in Whispell *v.* Whispell, *supra*, it was said: "Condonation is always subject to the condition that the husband shall afterwards treat his wife with conjugal kindness."

After a careful consideration of the conflicting evidence, and all the facts and circumstances disclosed by the record, we are of the opinion that the learned judge was correct in his conclusion upon the whole case when he said: "That the acts and conduct and treatment of the defendant of and towards the plaintiff during their married life were cruel and inhuman, and rendered it unsafe and improper for her to cohabit with him, and justified her in
437 leaving the defendant as she did, and seeking a residence separate and apart from him;" and that the authorities to which we have referred sustain his conclusion of law upon the findings of fact, in respect to the propriety of a separation.

(2.) It is insisted by the learned counsel for the appellant that the Kentucky judgment was a bar to this action. Defendant was a native citizen of Kentucky, and has resided there all his life, and on the 17th of October, 1888, he was married to the plaintiff, a native of this State. At the time of the marriage, the parties intended to make their home in and to reside in the city of Louisville, Kentucky. In pursuance of that intention, they continued to reside there until October, 1891, when the plaintiff "left the family abode." Under the statutes of Kentucky, in force at that time, either husband or wife could procure a divorce from the other, if, without the fault of the complaining party, the other party should abandon the complaining party, and such abandonment should continue for one year, and it was provided in the statute law of that State that an action for divorce might be commenced against a person whose absence from the State was continuous for four months, by means of "constructive process." Such an action was commenced, and such proceedings were had in virtue of the laws of the State of Kentucky, which resulted in a judgment pronounced by the circuit court of Jefferson county, Kentucky, awarding the defendant a divorce from the plaintiff on the ground of her alleged abandonment. A warning order was issued in that action and there was an appointment of a "representing attorney." Doubtless, according to the proceedings had in that action in the territorial

jurisdiction of Kentucky, the judgment would be efficient. Rhyms *v.* Rhyms, 7 Bush., 316; Hawkins *v.* Ragsdale, 80 Ky., 353. However, as no process was personally served on her in the State of Kentucky, and she made no appearance in that suit and in no
438 way has consented thereto or done — act which gives the judgment binding force upon her in this State, we think, according to the well-settled rule laid down in numerous cases in this State, that the judgment is wholly inoperative here in this State, and was not binding upon the plaintiff at the time of the commencement of this action, and that it forms no bar to her right to maintain this action against the defendant, who has personally appeared in the action. Borden *v.* Fitch, 15 John., 122; Beckwith *v.* Beckwith, 24 Week. Dig., 5; Kerr *v.* Kerr, 41 N. Y., 272; Hoffman *v.* Hoffman, 46 N. Y., 30; People *v.* Baker, 76 N. Y., 78; O'Dea *v.* O'Dea, 101 N. Y., 23; Jones *v.* Jones, 108 N. Y., 415; Cross *v.* Cross, 22 Week. Dig., 309; S. C., affirmed, 108 N. Y., 628; De Meli *v.* De Meli, 120 N. Y., 485; Rigney *v.* Rigney, 127 N. Y., 408; Williams *v.* Williams, 130 N. Y., 193; Davis *v.* Davis, 51 State Rep., 509; S. C., 22 Supplement, 191; 2 Bishop on Marriage, Divorce and Separation, section 155, edition 1891. Most of the authorities are quite satisfactorily reviewed in the opinion delivered at special term.

Inasmuch as the plaintiff was dwelling within this State at the time of the commencement of this action against her, according to section 1768 of the Code, as already stated, "she is deemed a resident thereof, although her husband resides elsewhere."

Although the husband in his action pending in the State of Kentucky was not allowed to obtain a divorce for the abandonment of him by his wife without proof that such abandonment was without fault upon his side, and although it may be true that that judgment adjudged that his abandonment was without his fault, such adjudication is not binding or conclusive upon the defendant here, inasmuch as the court had no jurisdiction of her at the time it rendered such judgment; and we cannot assent to the ingenious argu-
439 ment made by the learned counsel for the appellant based upon the supposed force of that judgment, as the assumption of the argument is that both "were domiciled during their whole married life" in the State of Kentucky, which assumption, we think, is not well founded. Rigney *v.* Rigney, *supra;* Williams *v.* Williams, *supra;* Davis *v.* Davis, *supra.*

(3.) It is now well settled that after parties have separated "a contract may be made through the intervention of a trustee, which is effective to bind the husband to contribute the sum therein provided for the future support of the wife." Galusha *v.* Galusha, 116 N. Y., 642. In that case, as well as in the case at hand, the contract was made after actual separation through the intervention of a trustee, and the defendant made several advances and payments according to the tenor of the contract thus entered into. The court in Galusha *v.* Galusha in speaking of the contract, said: "After its making it was not in the power of either party, acting alone and against the will of the other, to do an act which would destroy or affect that contract. * * * The law looks favorably upon and

encourages settlements made outside — courts between parties to a controversy. If, as in this case, the parties have legal capacity to contract, the subject of settlement is lawful, and the contract, without fraud or duress, is properly and voluntarily executed, the court will not interfere." And in Galusha *v.* Galusha, 138 N. Y., 283, after approving of the case from which we have already quoted, the court observed: "As the parties had, by an agreement lawful in form and apparently valid, stipulated as to the amount which the husband should pay for the support of the wife, that agreement, it was held, so long as it remained unrevoked, was the proper measure of compensation which the defendant should render for her maintenance after the dissolution of the marriage tie. * * * The effect of the former decision is to render the separation agree-
440 ment conclusive upon the plaintiff as to the amount of her allowance out of her husband's estate, until she becomes the actor in some action or proceeding * * * to terminate it." In the case in hand there are no allegations in the complaint attacking the validity of the separation agreement, and no specific prayer in the plaintiff's complaint that the agreement be cancelled or set aside, nor is the trustee made a party to this action. Under such circumstances, we think the separation agreement was binding upon the parties to this action. In the agreement of October 10th, executed by the parties and by Goodenow, the trustee for the plaintiff, is found the following provision: "If a divorce shall be granted, this agreement, so far as it concerns provision for Mary G. Atherton, shall be carried into the decree, as in full satisfaction of all claim for alimony, and so far as concerns provision for and custody of the child, reserving to the court the usual power to provide against events and contingencies not covered by this agreement." The agreement stipulates that the defendant shall pay to the plaintiff "for her support $125.00 at the beginning of each month until this agreement does by its own terms end." The provision directed by the decision at the special term for the plaintiff is for the same amount, and no satisfactory reason appears for disturbing the judgment in that regard entered upon the decision. The trial court properly exercised its equitable jurisdiction and discretion in the premises in awarding the custody of the child to the plaintiff, and in doing so followed well-recognized precedents. Matter of Waldron, 13 Johnson, 418; People *v.* Olmsted, 27 Barb., 9; Mercein *v.* The People, 25 Wend., 64 and 106.

The provision awarding an opportunity to the defendant to visit the child seems to be reasonable. Certain provisions are found in the agreement as to the amount the defendant, under the circumstances mentioned in the agreement, should pay annually "for
441 the comfortable maintenance of the child;" and, according to the provisions of the agreement, it seems that the allowance was to vary to meet changing circumstances that might arise in respect to the care and custody of the child if the circumstances should not remain as mentioned in the agreement. Manifestly the circumstances have changed, and it is quite apparent that the child, as such, was not bound by the terms of the agreement. It has

been suggested in some cases that a provision as to the child is void as against public policy. See Allen *v.* Affleck, 64 How., 380; People *v.* Mercein, 3 Hill, 410; People *v.* Mercein, 8 Paige, 67; *In re* Maurer, 18 Week. Dig., 568. Section 1766 of the Code, provides that where an action is brought by the wife for separation "the court may, in the final judgment of separation, give such directions, as the nature and circumstances of the case require. In particular, it may compel the defendant to provide suitably for the education and maintenance of the children of the marriage, and for the support of the plaintiff, as justice requires, having regard to the circumstances of the respective parties." It may be fairly assumed that the court exercised proper discretion in awarding the sum mentioned in its decision, to wit, $100 a month to be paid for the support, education and maintenance of the child, the child having now become upwards of four years of age and its wants and needs and expenses are necessarily greater than they were in October, 1891, when the parties separated; and we think the provision in respect to the child should be sustained.

(4.) Complaint is made by the learned counsel for the appellant of an incident that transpired during the progress of the trial in the presence of the parties and of their respective counsel. It seems the learned judge addressed himself to them in language of expostulation and admonition. In the course of his remarks he said: "I am satisfied that neither of these parties are bad
442 people. They intend to be good people, Christian people, and consid-ing the infant, dear to both, they ought to contrive to get together and be man and wife, and especially father and mother. * * * It seems to the court that whatever humiliation it may bring for the time being or whatever sinking of self may be required, it is their duty to join hands over the cradle of the little baby." These remarks were followed by others evidently emanating from a tender solicitude the trial judge entertained towards the child, and after hearing considerable evidence offered by either side relating to the controversy arising between the wife and husband. Counsel has called our attention to Livermore *v.* Bainbridge, 44 How., 357; S. C., affirmed, 47 How., 350. In that case the referee before making his report called on one of the plaintiffs personally and suggested to him whether it would not be better for the plaintiffs to settle the matter with the defendant by paying him $35,000, which defendant would probably accept, as there were matters in evidence in the case which led him to believe that if he did give judgment for the defendant, it would necessarily be for a very large amount; and in that case upon the opinion of Fancher, J., delivered at special term, the report of the referee was set aside, and the order made by him was affirmed in the general term. The opinion at the general term was delivered by Davis, P. J., in the course of which he observed: "It may be commendable in a referee or court in the presence of both parties to recommend and urge a settlement between themselves of their litigation." We find nothing in the case that aids the contention of the appellant that the learned trial judge in the case now in hand committed any indiscretion, or violated

any rule of law. His observations were in the presence of the parties and of their respective counsel. If we were of the opinion that a more experienced trial judge, with less human impulses,
443 would have omitted the admonition and expostulation and entreaty to the parties, somewhat warmly pronounced, still we should be constrained to hold that no legal error was committed, and hence no sufficient ground is made manifest for interfering with the final results reached by the trial court upon the questions of fact.

(5.) It is insisted by the appellant that the trial court erred in its sixth conclusion of law, which was as follows: "That the said defendant pay to the said plaintiff or her attorneys, and that the said plaintiff recover of him the sum of $1,000 counsel fee allowed in this action, and that she have execution therefor." A similar provision is inserted in the judgment. In section 1769 it is provided that in an action like the one before us "The final judgment in such an action may award costs in favor of or against either party." * * * The authority of the court is such as is conferred by statute. Erkenbrach *v.* Erkenbrach, 96 N. Y., 456; McBride *v.* McBride, 119 N. Y., 519.

In Beadleston *v.* Beadleston, 103 N. Y., 402, it was held that the power of the court to make an allowance to the wife for counsel fees and expenses is limited to such sums as may be necessary to enable her to carry on or defend the action. In that case it also appeared that after a trial an application was made for counsel fees and other expenses "without showing in the moving papers that it was needed further to defend the action," and it was held that the allowance was unauthorized.

In McCarthy *v.* McCarthy, a similar motion was made for extra allowance for costs in addition to the plaintiff's taxable costs and disbursements, and we upheld an order denying the application, and our decision was affirmed by the court of appeals, as appears by the record thereof in 137 N. Y., 500. In that case it was intimated that if an appeal was taken upon the merits, and an applica-
444 tion was made for expenses "to maintain or prosecute her rights under the judgment, the court would be authorized to make an allowance, including therein such expenses." We think the decision and judgment should be modified by striking therefrom the allowance of $1,000 counsel fee, and that it should remain so far as it awards the plaintiff taxable costs and disbursements.

Judgment modified by striking therefrom "the sum of $1,000 counsel fee, allowed," and as so modified, affirmed with costs to the respondent, against the appellant.

Martin, J., and Merwin, J., concur.

445 A copy.

STATE OF NEW YORK, *ss:*

Court of Appeals.

Pleas in the court of appeals, held at the capitol, in the city of Albany, on the 12th day of March, in the year of our Lord one thousand eight hundred and ninety-eight, before the judges of said court.

Witness the Hon. Alton B. Parker, chief judge, presiding.

W. H. SHANKLAND, *Clerk.*

Remittitur March 10th, 1898.

446 MARY G. ATHERTON, Respondent,
ag'st
PETER LEE ATHERTON, Appellant.

Be it remembered that on the 19th day of January, in the year of our Lord one thousand eight hundred and ninety-five, Peter Lee Atherton, the appellant in this action, came here into the court of appeals, by Seth C. Adams, his attorney, and filed in the said court a notice of appeal and return thereto from the judgment of the general term of the supreme court in and for the fourth judicial department; and Mary G. Atherton, the respondent in said action, afterwards appeared in said court of appeals by W. & N. E. Kernan, her attorneys; which said notice of appeal and the return thereto filed, as aforesaid, are hereunto annexed.

447 Whereupon the said court of appeals, having heard this cause argued by Messrs. Alex. B. Humphrey and Simon W. Rosendale, of counsel for the appellant, and by Mr. Wm. Kernan, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgment of the supreme court appealed from in this action be in all things affirmed; and it was further ordered and adjudged that the respondent recover against the appellant costs of appeal to this court.

And it was also further ordered that the record aforesaid and the proceedings in this court be remitted to the said supreme court, there to be proceeded upon according to law.

448 Therefore it is considered that the said judgment be in all things affirmed with costs, as aforesaid, and stand in full force, strength, and effect.

And hereupon as well *as* the notice of appeal and return thereto aforesaid as the judgment of the court of appeals aforesaid by them given in the premises are by the said court of appeals remitted into the supreme court of the State of New York, before the justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said supreme court before the justices thereof, &c.

W. H. SHANKLAND,

Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
ALBANY, *March 10th*, 1898.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said action in the court of appeals, with the papers originally filed therein, attached thereto.

[L. S.] W. H. SHANKLAND, *Clerk.*

449 At a trial and special term of the supreme court held at the court-house, in the city of Rome, on the 14th day of March, 1898.

Present: Hon. William E. Scripture, justice.

Supreme Court.

MARY G. ATHERTON
against
PETER LEE ATHERTON.

The defendant having appealed to the court of appeals from the judgment heretofore and on the 14th day of January, 1895, entered in the above-entitled action affirming the judgment entered in said action on the 8th day of January, 1894, and said court of appeals having heard the said appeal and having ordered and adjudged that said judgment so appealed from be in all things affirmed with costs of the said appeal:

Now, upon filing the remittitur from said court of appeals, and upon motion of Leslie W. Kernan, of attorneys for said plaintiff, it is—

Ordered that said judgment of the court of appeals be, and the same is hereby, made the judgment of this court, and that the aforesaid judgment entered herein on the 14th day of January, 1895, be, and the same is hereby, in all things affirmed with the costs of said appeal against the defendant, to be taxed.

Enter.

W. E. SCRIPTURE,
Justice Supreme Court.

STATE OF NEW YORK, } ss:
Oneida County, Clerk's Office, }

I, George D. Frank, clerk of said county and of the supreme and county courts therein, the same being courts of record, do hereby certify that I have compared the annexed copy of judgment-roll and the endorsements thereupon with the originals thereof on file in this office, and that the same is a correct transcript therefrom and of the whole of said original.

Seal Oneida County, New York.

In witness whereof I have hereunto set my hand and affixed the seal of said county and courts, at the city of Utica, this 23d day of March, 1898.

GEO. D. FRANK, *Clerk.*

450 [Endorsed:] Supreme court. Mary G. Atherton against Peter Lee Atherton. Copy. Order on remittitur. W. & N. E. Kernan, attorneys for plaintiff, Devereux block, Utica, N. Y.

SIR: Please take notice that the within is a copy of an order duly made and entered in the within-entitled action and this day duly filed in the office of the clerk of Oneida county.

Dated Utica, N. Y., March 14, 1898.

Yours, &c., W. & N. E. KERNAN,
Attorneys for Pl'ff.

To Seth C. Adams, Esq., attorney for def't.

451 Supreme Court, Oneida County.

MARY G. ATHERTON *against* PETER LEE ATHERTON. } Judgment of the 14th Day of March, 1898.

The defendant having appealed to the court of appeals from the judgment heretofore and on the 14th day of January, 1895, entered in the above-entitled action, affirming the judgment entered in said action on the 8th day of January, 1894, and said court of appeals having heard the said appeal and ordered and adjudged that said judgment so appealed from be in all things affirmed with costs, and the remittitur from said court of appeals having been duly filed in this court and an order duly entered thereon making the judgment of the court of appeals the judgment of this court and directing judgment to be entered herein, as hereinafter adjudged, with costs, and the plaintiff's costs having been taxed at the sum hereinafter stated:

Now, upon motion of Leslie W. Kernan, of attorneys for said plaintiff, it is adjudged that the judgment hereinbefore mentioned, entered herein on the 14th day of January, 1895, be, and the same is hereby, in all things affirmed.

And it is further adjudged that the plaintiff, Mary G. Atherton, recover from and against the defendant, Peter Lee Atherton, the sum of one hundred thirty-eight dollars and twenty-eight cents, the amount of her costs herein, in the court of appeals, as taxed, and that she have execution against the said defendant therefor.

Judgment-roll filed and judgment signed, entered, and docketed this 14 day of March, 1898, at 12.55 p. m.

GEO. D. FRANK, *Clerk.*

452 [Endorsed:] Supreme court. Mary G. Atherton against Peter Lee Atherton. Copy judgment. W. & N. E. Kernan, attorneys for plaintiff, Devereux block, Utica, N. Y.

Please take notice that the within is a copy of a judgment duly made and entered in the within-entitled action and this day duly filed in the office of the clerk of Oneida county.

Dated Utica, N. Y., March 14, 1898.

Yours, &c., W. & N. E. KERNAN,
Attorneys for Pl'ff.

To Seth C. Adams, Esq., attorney for def't.

453 In the Supreme Court of the United States.

PETER LEE ATHERTON, Plaintiff in Error,
vs.
MARY G. ATHERTON, Defendant in Error.

In error to the supreme court of the State of New York in and for the county of Oneida.

To the Hon. Rufus W. Peckham, associate justice of the Supreme Court of the United States:

Your petitioner, Peter Lee Atherton, would respectfully represent that heretofore, to wit, on the 9th of January, 1893, Mary G. Atherton presented her verified complaint in the supreme court of the State of New York in and for Oneida county against your petitioner, wherein said Mary G. Atherton sought a decree of limited divorce against your petitioner and decree for alimony and custody of the infant child of the said Mary G. Atherton and your petitioner (R., folio 312, etc.). Thereafter your petitioner duly filed his answer to the said complaint (ff. 1452, &c.), wherein, among other defenses, your petitioner set up that a judgment had been entered in a court of the State of Kentucky in a suit wherein your petitioner was plaintiff and the said Mary G. Atherton was defendant, and which court was a court of general jurisdiction and having jurisdiction of the cause of action and of the parties, and that said court had duly entered a decree which dissolved the bonds
454 of matrimony between your petitioner and the said Mary G. Atherton, and granted to your petitioner a divorce *vinculo matrimonii*, and in the said answer your petitioner claimed that the said court of the State of New York, where the said Mary G. Atherton had filed her complaint, was bound under the Constitution and laws of the United States to give to the said decree of the State of Kentucky full faith and credit, and the same faith and credit as would be given to it by the courts of the State of Kentucky, which would be to the effect that the said Mary G. Atherton and your said petitioner had ceased to be husband and wife. Your petitioner says that he filed in the said cause a duly verified copy of the proceedings in said court of the State of Kentucky, which were read on the hearing of the said cause (ff. 1040, &c.). Your petitioner says that, said cause having come on for hearing at a special term of the said supreme court for Oneida county, the said court disregarded the plea of your said petitioner and refused to give any faith or credit to the said judgment and proceedings, as aforesaid, and entered a decree against your petitioner in entire disregard of said decree of the said Kentucky court aforesaid (ff. 1571, &c.). Your petitioner says that he thereupon caused an appeal to be taken from said judgment of the supreme court of New York at special term to the supreme court of the State of New York at general term, and therein your petitioner still insisted upon the effect, as aforesaid, to be given said decree of the said Kentucky court, as aforesaid, but the said supreme court,

general term, affirmed, with a slight modification not necessary
455 to be here mentioned, the judgment of the special term (ff. 1716, &c.), and refused to give any effect whatever to the said judgment of the Kentucky court; and thereupon your petitioner caused an appeal to be taken from the judgment of the supreme court, general term, as aforesaid, to the court of appeals of the State of New York, and in said court insisted that full credit should be given to the said decree in the Kentucky court, as aforesaid; but said court of appeals of New York refused to give either credit or effect to the said decree of the said Kentucky court, and in all respects affirmed the judgment of the said special term and general term, and ordered that the said cause should be remitted to the court of original jurisdiction; and thereupon the said court of original jurisdiction did enter a final judgment ordering that the said judgment of the court of appeals be, and the same was thereby, made the judgment of the said supreme court in and for Oneida county, and that the judgment entered in the said supreme court for Oneida county on the 14th day of January, 1895, be, and the same was in all things, thereby affirmed. The said judgment upon the said remittitur was entered in the said supreme court, special term, on the 14th day of March, 1898.

Your petitioner now prays your honor to grant unto him a writ of error from the said judgment, as aforesaid, and doth now assign as error the following:

1st. That said judgment is against the right of the said petitioner.

2nd. That the said judgment fails to give that faith and
456 credit to the decree of the court in Kentucky to which under the Constitution and laws of the United States it is entitled.

3rd. That, due respect and effect being given to the said judgment of the Kentucky court under the Constitution and laws of the United States, the said petitioner was, at the time that he filed his answer in said case brought against him by the said Mary G. Atherton in the supreme court of the State of New York, not the husband of the said Mary G. Atherton, but the bonds of matrimony between the said Mary G. Atherton and himself had been sundered.

4th. That the judgment of which your petitioner complains is erroneous and violative of the rights of your petitioner under the Constitution and laws of the United States.

Respectfully submitted.

April 28, 1898.

PETER LEE ATHERTON,
By ALEXANDER POPE HUMPHREY &
GEO. M. DAVIE, *His Counsel.*

Allowed this 27th of April, 1898.

R. W. PECKHAM,
Asso. Jus. Sup. Ct. of U. S., Washington, D. C.

STATE OF NEW YORK, }
Oneida County, Clerk's Office, } *ss:*

I, George D. Frank, clerk of said county and of the supreme and county courts therein, the same being courts of record, do hereby certify that I have compared the annexed copy of record and the endorsements thereupon with the original thereof on file in this office, and that the same is a full, true, & complete transcript therefrom and of the whole of said original.

Seal Oneida County, New York.

In witness whereof I have hereunto set my hand and affixed the seal of said county and courts at the city of Utica, this 12 day of May, 1898.

GEO. D. FRANK, *Clerk.*

457 [Endorsed:] United States Supreme Court. Mary G. Atherton *ag'st* Peter Lee Atherton. Writ of error. Filed May 9, 1898, in Oneida county clerk's office.

458 UNITED STATES OF AMERICA, *ss:*

To Mary G. Atherton, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of New York, wherein Peter Lee Atherton is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Rufus W. Peckham, associate justice of the Supreme Court of the United States, this 28th day of April, in the year of our Lord one thousand eight hundred and ninety-eight.

R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

459 [Endorsed:] Personal service of the within citation is hereby admitted this 9th of May, 1898, and also of the writ of error therein named—a copy of each. W. & N. E. Kernan, attorneys for Mary G. Atherton. Filed May 9, 1898, in Oneida Co. clerk's office.

460 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the supreme court of the State of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court on a remittitur from the court of appeals of the State of New York, before you or some of you, being the highest court of law or equity

of the said State in which a decision could be had in the said suit between Mary G. Atherton, plaintiff, and Peter Lee Atherton, defendant, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in ques-
461 tion the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said defendant, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 28th day of April, in the year of our Lord one thousand eight hundred and ninety-eight.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

462 Know all men by these presents that we, Peter Lee Atherton, as principal, and The Fidelity and Deposit Company of Maryland, as surety, are held and firmly bound unto Mary G. Atherton in the full and just sum of one thousand dollars, to be paid to the said Mary G. Atherton, her certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 28th day of April, in the year of our Lord one thousand eight hundred and ninety-eight.

Whereas lately, at a supreme court of the State of New York, in a suit depending in said court between Mary G. Atherton and Peter Lee Atherton, a judgment was rendered against the said Peter Lee Atherton, and the said Peter Lee Atherton having obtained a writ of error and filed a copy thereof in the clerk's office of the said court

to reverse the judgment in the aforesaid suit, and a citation directed to the said Mary G. Atherton, citing and admonishing her to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date thereof:

Now, the condition of the above obligation is such that if the said Peter Lee Atherton shall prosecute said writ to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

PETER LEE ATHERTON, [L. S.]
Per ALEX. P. HUMPHERY, *Att'y.*
FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
By J. SPRIGG POOLE, *Attorney-in-fact.* [L. S.]

Sealed and delivered in presence of—
—— ——.

Approved by—
R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

STATE OF NEW YORK, } *ss:*
Oneida County, Clerk's Office, }

I, George D. Frank, clerk of said county and of the supreme and county courts therein, the same being courts of record, do hereby certify that I have compared the annexed copy of bond and the endorsements thereupon with the original thereof on file in this office, and that the same is a correct transcript therefrom and of the whole of said original.

Seal Oneida County, New York

In witness whereof I have hereunto set my hand and affixed the seal of said county and courts, at the city of Utica, this 10 day of May, 1898.

GEO. D. FRANK, *Clerk.*

463 [Endorsed:] Bond. Peter Lee Atherton to Mary G. Atherton. Oneida county, *ss:* Recorded on the 9 day of May, 1898, at 4.15 o'clock p. m., in Liber 4 of Bonds, page 394, and examined. Filed May 9, 1898, in Oneida Co. clerk's office.

464 In the Supreme Court of the State of New York.

I, William E. Scripture, a judge of the supreme court of the State of New York, do hereby certify that the foregoing attestation by George D. Frank, clerk of said supreme court in and for the county of Oneida, in the State of New York, with the seal of the supreme court thereto annexed, is in due form.

Dated March 23rd, 1898.

W. E. SCRIPTURE,
Justice Supreme Court.

Endorsed on cover: Case No. 16,881. New York supreme court. Term No., 301. Peter Lee Atherton, plaintiff in error, *vs.* Mary G. Atherton. Filed May 21st, 1898.

No. 17

Brief of Humphrey & Davie, for P.

Supreme Court of the United States

Office Supreme Court U. S.
FILED
SEP 21 1899
JAMES H. MCKENNEY,
Clerk.

Filed Sept. 21, 1899.

P. L. ATHERTON, - - - *Plaintiff in Error,*

VERSUS

MARY G. ATHERTON, - *Defendant in Error.*

Brief for Plaintiff in Error.

ALEX. POPE HUMPHREY,
GEO. M. DAVIE,
Counsel for Plaintiff in Error.

JOHN P. MORTON & CO., PRINTERS, LOUISVILLE.

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SUPREME COURT OF THE UNITED STATES.

P. L. ATHERTON, - - - - *Plaintiff in Error,*

VERSUS

MARY G. ATHERTON, - - - *Defendant in Error.*

Brief for Plaintiff in Error.

STATEMENT.

This is a writ of error to the Supreme Court of the State of New York. It runs to a judgment entered in that court under a remittitur from the Court of Appeals. For convenience we will call the plaintiff in error, Mr. Atherton, and the defendant in error, Mrs. Atherton. They were at one time husband and wife. The question in this case is as to whether they still continue to occupy that relation to each other, or whether Mr. Atherton is now a single man and Mrs. Atherton a single woman.

Mr. Atherton claims that the relation heretofore existing was dissolved by a valid judgment of divorce *a vinculo*, rendered by a court of the State of Kentucky. This judgment being pleaded in New York was held to be void. The federal question is whether the courts of New York have given to the judgment of the Kentucky court the faith and credit to which, under the Constitution and laws of the United States, it was entitled.

Peter Lee Atherton has, from his birth, been a citizen of Kentucky and never had any other citizenship, residence or domicile. (R. 221.) He was married to Mary Goodenow Kelsey in Oneida County, New York, on October 17, 1888. (R. 221.) After the marriage Mr. and Mrs. Atherton went to Louisville,

Kentucky, where they took up their home with the parents of Mr. Atherton. (R. 221.) They continued to reside there until in October, 1891, Mrs. Atherton left her husband's house. Since that time there has been a continuous separation. (R. 221.)

On January 8, 1890, a daughter was born, whose name is Mary V. Atherton. (R. 221.)

On leaving her husband's house, Mrs. Atherton took with her the child. After an interval of a day or two, which she spent at the house of a neighbor, Mrs. Atherton went with her child to the Galt House, in Louisville, Kentucky. There she was joined by Mr. C. D. Adams, a leading lawyer from Utica, New York; her cousin, Mr. Henry P. Goodenow, who is a lawyer, living in Minnesota; her aunt, Miss Goodenow; Mr. and Mrs. Evans, her brother-in-law and sister; and she also had the benefit of the counsel of a Louisville lawyer, Mr. E. J. McDermott. (R. 131.)

Mrs. Atherton's three legal representatives met the counsel for Mr. Atherton at the office of the latter. The counsel for Mr. Atherton invited Mrs. Atherton, through her counsel, to return with the child to his home, without any conditions being made upon such invitation. This was declined. It was then agreed between the counsel that pending negotiations the child should not be removed beyond the jurisdiction of the courts of the State of Kentucky. After negotiations continuing during three or four days, a result was reached in the form of an agreement, which is as follows (R. 142, 174, 217, 221, 228):

Agreement.

"The undersigned, Peter Lee Atherton, and his wife, Mary G. Atherton, having ceased to live together as man and wife, without in any way acknowledging upon whom is the fault, or condoning the conduct of the one or the other which has led to the existing state of affairs, or preventing any consequence which may follow, or right which may arise to either party if such status shall continue, desire to provide for the best interest of their child, Mary Valeria Atherton. With this view they have entered into the following agreement:

"Peter Lee Atherton contracting with Henry P. Goodenow as trustee for Mary G. Atherton, and said trustee contracting with Peter Lee Atherton on behalf and jointly with Mary G. Atherton.

"1. The child is hereby committed for its nurture, education, and control to the joint custody and guardianship of her mother, Mary G. Atherton, and her paternal grandmother, Maria B. Atherton, on the following basis:

"The domicile of the child is to be the State of Kentucky. The mother is to have the child until January 1, 1892. During the years 1892, 1893, and 1894 the grandmother is to have the child and control its abode, travel, and custody from January 1 to the first week in May; and the mother from the first week in May to December 31st. After that period, during the existence of this arrangement, the grandmother's custody, control, etc., is to exist during the first four and last two months of the year; that of the mother during the other months of the year.

"2. During that part of each year in which the child is under the control of the mother, Peter Lee Atherton is to pay into the hands of Mary G. Atherton $500 in installments of equal amounts at the beginning of each of the months of said control, for the comfortable maintenance of the child. The expense of conveying the child with a proper attendant, in the journey to the mother, Mary G. Atherton, is to be borne by the father, Peter Lee Atherton, and the like expense on the journey back to the grandmother is to come out of the sum provided for the child's support.

"3. Peter Lee Atherton is to pay into the hands of Mary G. Atherton for her support $125 at the beginning of each month until this agreement does by its own terms end. This is to be taken in lieu of alimony and dowable and distributable share in his estate.

"4. The following provisions are made for the termination of this agreement and for the contingency of various events that may happen in the future; among others, divorce and second marriage of Peter Lee Atherton or Mary G. Atherton:

"*a*. This agreement as to the child is to terminate on her arrival at fourteen years of age, it being recognized that she will then be old enough to choose for herself. It shall, of course, in like manner, terminate at her death.

"*b*. This agreement as to the support of Mary G. Atherton is to end at her death, or upon her again marrying, and in any event, on the 8th day of January, 1904.

"*c.* If Mary G. Atherton shall marry again or die, the person then being joint guardian with her of the child shall become its sole guardian. If Maria B. Atherton shall die while she is joint guardian, Peter Lee Atherton, if alive, or if he be dead, his father, John M. Atherton, shall choose a successor in the joint guardianship; and if Mary G. Atherton objects to the person so nominated, the senior (in years) judge of the Jefferson Circuit Court shall decide the question of fitness and confirm or reject such nomination.

"*d.* A successor to said successor may under similar circumstances be in like manner chosen.

"*e.* If, during the existence of this agreement, Mary G. Atherton, being the joint guardian, John M. Atherton and Maria B. Atherton shall die, and Peter Lee Atherton die or be or become married, the sole guardianship shall rest in said Mary G. Atherton.

"*f.* If, during the lives of Peter Lee Atherton and Mary G. Atherton, a sole guardianship shall have resulted under the terms of this agreement, each parent shall have reasonable access to and right of visitation from the child, notwithstanding such parent may have again married.

"*g.* If a divorce shall be granted, this agreement, so far as it concerns provision for Mary G. Atherton, shall be carried into the decree as in full satisfaction of all claim for alimony, and so far as concerns provision for and custody of the child, reserving to the court the usual power to provide against events and contingencies not covered by this agreement.

"Witness the signature of all the parties this October 10, 1891.

"HENRY P. GOODENOW.
"MARY G. ATHERTON.
"PETER LEE ATHERTON.

"In the presence of:

"EDWARD J. DERMOTT.
"C. D. ADAMS."

There was paid by Mr. Atherton to the representatives of Mrs. Atherton $250, and in a few days thereafter she left the State of Kentucky, taking the child with her. (R. 159, 172.)

Mrs. Atherton delivered the child to the paternal grandmother in Cincinnati in the first week of January, 1892. The paternal grandmother re-delivered the child to Mrs. Atherton in

Buffalo in 1892. Mr. Atherton caused to be paid into the hands of Mrs. Atherton regularly, month by month, the amounts agreed upon for the support of the child in her custody, and also for her own support, up to and including a payment made in November, 1892. (R. 159, 172.)

In November, 1892, Mrs. Atherton caused notice to be given to Mr. Atherton that she would no longer abide by the provisions of the agreement, and particularly that she would not respect the same in regard to her duty to deliver the child to its paternal grandmother on January 1, 1893. (R. 172.)

Mrs. Atherton has ever since that time retained possession of the child, and has kept it out of the State of Kentucky.

December 28, 1892, Mr. Atherton began an action for divorce against Mrs. Atherton in the Louisville Law and Equity Court, upon the ground that she had abandoned him in October, 1891, without his fault, and had continued such abandonment for more than one year then last past. This is a ground for divorce *a vinculo* under the laws of the State of Kentucky. Showing was made in the case that Mrs. Atherton had been absent from Kentucky for four months. Thereupon the clerk of the Louisville Law and Equity Court entered an order warning Mrs. Atherton to appear and answer the petition within sixty days of December 28, 1892, and appointed John C. Walker, a regular practicing attorney in the court, to inform Mrs. Atherton of the institution of the action. (R. 150.)

This attorney on January 5, 1893, wrote a letter containing a full statement of the nature and purposes of the suit, and enclosed a substantial copy of the petition to Mrs. Atherton. This he placed in the post-office, addressed to her at Clinton, New York, duly stamped, and with request on the back of the envelope for it to be returned to him from the post-office if not received by her. The letter was never returned to him. (R. 151.) Mr. Atherton's allegations in his answer to the New York suit, as hereinafter mentioned, that the letter was received by her, and that she knew of the pendency of the divorce suit

from the time it was filed, or soon after that, and of its nature and purposes, and voluntarily failed to defend the same—are all undenied. (R. 213, 214, 219.)

This action regularly proceeded in the Kentucky court, and on March 14, 1893, judgment was entered dissolving the bonds of matrimony, upon the ground that Mrs. Atherton had abandoned Mr. Atherton without fault of Mr. Atherton while both were residing in Jefferson County, in the State of Kentucky, in October, 1891, and that the abandonment had continued without interruption from October, 1891, to the date of the entering of the judgment; and upon the filing of the petition in the cause, the abandonment had existed for more than one year.

The following is the judgment of the Kentucky court in full:

> "And afterwards, at a court held for the court aforesaid, on the 14th day of March, 1893:
>
> "This action having come on to be heard upon the pleadings, report of attorney for the absent defendant and the evidence, and the court being advised, it is considered by the court that the plaintiff, Peter Lee Atherton, has resided in Jefferson County, Ky., continuously for ten years last past, and that he and the defendant, Mary G. Atherton, were married on the 17th day of October, 1888; that from the date of said marriage the said plaintiff and defendant resided in Jefferson County, Kentucky; that while the plaintiff and defendant were thus residing in Jefferson County, Kentucky, to wit, in the month of October, 1891, the defendant, Mary G. Atherton, without fault upon the part of the plaintiff, abandoned him, and that said abandonment has continued without interruption from that time to this, and at the filing of the petition herein had existed for more than one year; that the defendant, Mary G. Atherton, had, at the filing of the petition herein, been absent from this state for more than four months; that therefore it is further considered and adjudged by the court that the plaintiff, Peter Lee Atherton, is entitled to the decree of divorce prayed for in this petition, and that the bonds of matrimony between the said plaintiff, Peter Lee Atherton, and the said defendant, Mary G. Atherton, be and they are hereby dissolved.
>
> "It appearing to the court that in the said marriage there was born a daughter, Mary Valeria Atherton, on January

8, 1890, and that the defendant, Mary G. Atherton, now has the said child beyond the jurisdiction of this court, without the consent of the plaintiff; and that the court can not make an effective order in reference to the custody of said child, no order will now be made as to such custody, or as to any allowance of alimony, or in the nature thereof to the said defendant; but the court reserves the power to make such orders hereafter.

"It is further considered by the court that each party shall restore to the other any property, not disposed of at the commencement of this action, which he or she may have obtained directly or indirectly from or through the other during marriage, in consideration or by reason thereof.

"The sum of twenty dollars is allowed John C. Walker, warning order attorney, and the plaintiff shall pay this and all the other costs of the action to this date incurred." (R. 152.)

The Kentucky law of divorce and procedure is fully set out in the Record. (R. 209-213.)

It was agreed that in lieu of evidence either party might refer to the statutes and decisions of Kentucky. (R. 144.)

For convenience, so much of Mr. Atherton's answer in the New York cause as sets out the law of Kentucky is printed in the Appendix.

The proceeding to bring Mrs. Atherton before the court is such as was and is authorized by the law of the State of Kentucky in cases of non-resident defendants as well as in cases of defendants resident in Kentucky who have been absent four months.

After Mr. Atherton had thus brought his suit in Kentucky, Mrs. Atherton, on January 13, 1893, filed a suit in the Supreme Court of Oneida County, New York, and had process served on Mr. Atherton in Kentucky, according to the New York statutes, by sending a copy of the complaint through the mail addressed to him at his home in Louisville, Ky. (R. 178, 179, 180.)

In this complaint she alleged that at the time of her marriage she was a resident of the State of New York, and Mr. Ather-

ton a resident of Louisville; that after the marriage they both resided in Louisville, the home of the father and mother of the defendant, and continued to reside there until she left Mr. Atherton in October, 1891 (R. 181); that in October, 1891, she ceased to live with Mr. Atherton as his wife and came to Clinton, in the State of New York, bringing with her the child, and that she and the child had since resided at Clinton, and since October, 1891, she had been and at the time of the commencement of the action was a resident of the State of New York, and the child was there in her custody; that Mr. Atherton had continued to reside and then resided at Louisville, Kentucky, and was a resident of the State of Kentucky.

She charged Mr. Atherton with being a man of violent and ungovernable temper, and alleged that by reason of abuse and threats she was greatly frightened and feared that if she returned to him he would do her injury and would separate her from the child. There are both general and specific allegations of fact claimed to be cruel and inhuman treatment. She demanded judgment for separation from bed and board; the custody of the child, and that Mr. Atherton be compelled to provide suitably for her and for the maintenance and education of the child.

To this complaint Mr. Atherton filed his answer, which put in issue the allegations in the complaint of violence and cruelty. (R. 191.) It set up substantially the facts we have heretofore stated in regard to the marriage, the residence, the separation of the parties, the entering into the agreement, and Mrs. Atherton's violation of it. It pleaded the institution by Mr. Atherton of the suit in Kentucky for divorce and the proceedings therein, and the final judgment. It claimed that Mrs. Atherton, up to the entering of the judgment, had her domicile and legal residence in the State of Kentucky, and that the courts of that State had full and complete jurisdiction of the subject-matter and parties, and power to render the judgment, and that by its force the bond of matrimony had been absolutely dissolved between the parties.

By the answer Mr. Atherton claimed and demanded that full force and effect be given to the judgment as provided for in the Constitution of the United States and the Act of Congress in pursuance thereof. (R. 215.) He asked that the complaint be dismissed, and that he be awarded the custody of the child. A full copy of the Kentucky record was presented. (R. 144, 150, 177.)

To this answer Mrs. Atherton filed a reply in which she admitted her signature to the agreement, but denied none of the allegations as to its breach. (R. 219.) She attempted to avoid these by alleging that she was unfit to make the agreement mentioned or any agreement, because she had become exhausted, nervous, weak, and sick in body; that when the arrangement was proposed to her she objected to the same and refused and declined to sign it until it was stated and represented to her that the agreement was not and would not be permanent, and that it was intended to be and would be a mere experimental and temporary arrangement, not binding upon her if she became dissatisfied with it; that it was for a year only, and would be binding upon her only for a year. She alleged that understanding, and, believing that the agreement would not be permanent and was intended to be a mere experimental and temporary arrangement, she signed it. She further alleged that at the time it was signed it was not intended or understood by any of the parties that the same was or would be permanent, but was intended and understood as temporary and as binding at most for a year only. She claims that it was void as to her.

For a further reply to the answer of Mr. Atherton, she said:

> "That as to the allegations in the said answer of the statutes and laws of the State of Kentucky, and of the commencement of and proceedings in the alleged action in the State of Kentucky, and of the alleged judgment recovered therein as claimed and alleged in said answer, this plaintiff denies any knowledge or information of such allegations or of any of them sufficient to form a belief; and therefore denies the same."

She further alleged that no process in the action was ever served upon her, and if the action was commenced, and if the judgment was recovered therein, the same was not binding upon her, and was not a bar to her suit.

On the issues thus framed, a trial was had before the Supreme Court, Special Term, Hon. P. B. McLennan presiding. His finding of facts is at R. 221, 225, 228, 233; the judgment, R. 225; his opinion, R. 235. It is sufficient for the present purpose to say that the court found that Mr. Atherton's conduct to Mrs. Atherton was such that, in the judgment of the court, she was justified in leaving him; that she did leave him and rightfully come to the State of New York, and there became domiciled, acquiring in this way a domicile separate from that of Mr. Atherton; and that such was her domicile when Mr. Atherton filed his suit in December, 1892.

The judgment declared that Mrs. Atherton should be forever separated from Mr. Atherton, and from his bed and board, and that Mrs. Atherton should have the care, custody, and education of the child; that Mr. Atherton should pay to Mrs. Atherton $125 per month from the date of the judgment, January 6, 1894, as alimony, and for her separate support, and that he should pay to Mrs. Atherton the sum of $100 per month, on the same date, for the care, maintenance, and education of the child of the marriage; the first payment, viz., that to Mrs. Atherton for herself, to be during her natural life; that on account of the child, until she should attain the age of twenty-one years.

Mr. Atherton was given the right to see the child, and to visit her at all reasonable times at Clinton, Oneida County, New York, or any other place where she might be residing with her mother.

On appeal this judgment, with an immaterial exception, was affirmed by the Supreme Court, General Term (R. 245), the opinion of the court being at R. 247.

On further appeal to the Court of Appeals, it was adjudged that the judgment of the Supreme Court be in all things affirmed, and that the record be remitted to be proceeded upon according to law. (R. 255.)

The opinion of the New York Court of Appeals has not been copied into the record, but we have printed it as an appendix to this brief. It is reported *sub nom.* Atherton v. Atherton, 155 N. Y. 129.

The judgment of the Court of Appeals was made the judgment of the Supreme Court, Special Term. (R. 256, 257.) The errors assigned by Mr. Atherton are as follows:

Errors Assigned.

1. That said judgment is against the right of the said petitioner.

2. That the said judgment fails to give that faith and credit to the decree of the court in Kentucky to which, under the Constitution and laws of the United States, it is entitled.

3. That due respect and effect being given to the said judgment of the Kentucky court under the Constitution and laws of the United States, the said petitioner was, at the time that he filed his answer in said case brought against him by the said Mary G. Atherton in the Supreme Court of the State of New York, not the husband of the said Mary G. Atherton, but the bonds of matrimony between the said Mary G. Atherton and himself had been sundered.

4. That the judgment of which your petitioner complains is erroneous and violative of the rights of your petitioner under the Constitution and laws of the United States.

ARGUMENT.

We deem it important that the court should apprehend at the outset the exact question to be decided.

Statement of Facts Not Disputed.

The undisputed facts are that Mrs. Atherton, before her marriage, was domiciled in New York; Mr. Atherton, in Kentucky. They were married in New York with the view and intention, immediately executed, of coming to Kentucky to live. Kentucky, therefore, became Mrs. Atherton's domicile, not alone because it was her husband's domicile, but also because she selected it as her domicile. Kentucky was the domicile of Mr. and Mrs. Atherton during the whole time that they lived together as man and wife. Mr. and Mrs. Atherton separated in Kentucky. Mrs. Atherton came away from Kentucky to New York, Mr. Atherton remaining in Kentucky. This was in October, 1891. A year, thereafter, viz., in December, 1892, Mr. Atherton brought his suit for divorce in a court of the State and county where Mr. and Mrs. Atherton had had their domicile during the whole time that they lived together as man and wife. The ground of divorce alleged was one which, by law, was a ground for divorce when the parties were married and when they came to live in Kentucky. The process used for bringing Mrs. Atherton before the court was such process as was in force at the time Mr. and Mrs. Atherton separated, and at the time Mrs. Atherton left Kentucky.

In order that Mr. Atherton might obtain a divorce he was compelled to allege and prove that Mrs. Atherton had abandoned him, and that such abandonment was without fault on his part, and that it had existed, at the time his petition was filed, for more than a year.

The proceedings in which Mr. Atherton obtained his judgment for divorce in Kentucky were entirely regular according to the law of that State. This was found by Judge McLennan. (R. 228.) He concisely summed up these findings in his opinion, from which we make this extract:

> "The Jefferson Circuit Court of the State of Kentucky had jurisdiction of the subject-matter of the action, and evidence was produced which, under the statutes of that

State, the court considered entitled the plaintiff in that action to the relief prayed for in his petition. All the forms of law were strictly complied with, and a judicial determination was made, after considering the evidence and circumstances presented, dissolving the marital relations existing between the parties to that action. The court decided that this plaintiff (Mrs. Atherton) had abandoned the defendant (Mr. Atherton) without fault on his part, and that being a ground for absolute divorce, under the laws of the State of Kentucky, rendered judgment accordingly. Was that judgment so rendered binding and conclusive upon the plaintiff (Mrs. Atherton) in this action? If it was, she can not succeed here." (R. 236.)

Reason of New York Courts for Holding Kentucky Judgment Void.

The ground upon which the courts of New York have denied to this judgment validity, and upon which they have pronounced it of no force and effect, is this: They hold that an action for divorce is an action *in personam*, and that a defendant not served with process within the jurisdiction can, where such judgment is relied on in any State other than that in which it was rendered, disregard its findings. They do not deny that substituted service will be valid and sustain a judgment *in personam*, provided the defendant be at the time such substituted service is employed domiciled in the State where the suit is brought.

If, however, the defendant is elsewhere domiciled, process must be served personally within the territorial limits of the State where the action is pending.

In case of a suit by husband against a wife, these courts hold that it is competent for the wife to show that she was not personally served within the territorial jurisdiction, and had, prior to any substituted service, acquired a new domicile; and to this end is to prove, first, the actual acquisition of such new domicile; second, her right to acquire a new domicile. And this last can be shown by evidence, that by reason of the conduct of the husband, the wife was justified in separating herself from him;

and this proof of fault in the husband may be made, and the judgment avoided, although the fact that the husband is without fault was necessary to be alleged, and proved, and was alleged, and proved in the proceeding, and was expressly found, in the judgment of divorce, as a part of the final order in the divorce proceedings.

There is here no case of the husband leaving the matrimonial domicile and elsewhere procuring a divorce. There is here no case of the husband attempting to procure a divorce at the matrimonial domicile for a cause which occurred outside of that domicile. There is here no case of the husband alleging any ground of divorce which was not such at the time the wife separated from him, and went beyond the matrimonial domicile, nor of his using any proceedings in the way of substituted service different from those in existence at that time.

The questions of the effect of judgments for divorce under the law of nations or as between the States in the Union, under the Constitution and laws of the United States, are so important and so various and of such great consequence that we have considered it expedient, in the very outset, to inform the Court of the exact limits within which its present judgment is to be bounded.

Logic of the Opinion of the Court of Appeals of New York in this Case.

Concisely stated, we submit that the Court of Appeals of New York has decided in this case the following propositions:

A husband and wife, domiciled in another State of the Union, separate. One of them goes to New York and acquires a domicile. The other can not thereafter bring a suit for divorce at the matrimonial domicile unless by some means the one who has left the State can be induced to return to it and there be served with process, or persuaded to enter an appearance to the action.

This right of exemption from suit at the matrimonial domicile arises from the acquisition of the new domicile. If the wife

is the one who abandons the matrimonial domicile, in order to show that she has acquired the new domicile she must prove that her leaving her husband was through his fault; but she can prove this even though the contrary has been adjudged in an action at the matrimonial domicile.

If, however, it is the husband that has abandoned the wife, it matters not who was in fault, because a man has the right at his will to change his domicile.

As the ultimate fact which defeats the jurisdiction of the matrimonial domicile is the acquisition of a new domicile, the husband need give no reason for the change.

In New York, before a suit for divorce can be brought, the complainant must be a resident of the State. In the case supposed, therefore, of either husband or wife leaving the other and coming to New York, and there acquiring a domicile, the only remedy for the other spouse is to acquire a residence in New York, and in this way procure such relief as its laws will afford. Whatever offense may have been committed, immunity from suit at the matrimonial domicile is complete. The law of New York must determine the liability, and in that forum must relief be sought. And if it should become like that of South Carolina, there could be no relief at all.

What Faith and Credit is a Judgment of One State Entitled to in Another?

Article 4, Section 1, of the Constitution of the United States is as follows:

> "Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State; and the Congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof."

In Huntington v. Attrill, Mr. Justice Gray, delivering the opinion of this court, after quoting the constitutional provisions above given, said:

"This clause of the Constitution, like the less perfect provision on the subject in the Articles of Confederation, as observed by Mr. Justice Story, 'was intended to give the same conclusive effect to judgments of all the States, so as to promote uniformity, as well as certainty, in the rule among them; and had three distinct objects; first, to declare, and by its own force establish, that full faith and credit should be given to the judgments of every other State; second, to authorize Congress to prescribe the manner of authenticating them; and third, to authorize Congress to prescribe their effect when so authenticated. Story on the Constitution, Sections 1307, 1308.' Congress, in the exercise of the power so conferred, besides prescribing the manner in which the records and judicial proceedings of any State may be authenticated, has defined the effect thereof, by enacting that 'the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken.' Rev. Stat., Section 905, re-enacting Act of May 26, 1790, c. 11, 1 Stat. 122." (146 U. S. 684-685.)

It is obvious that this is a rule higher than international comity.

It appears, however, that even upon the ground of international comity, the courts of the United States will be governed by the rule of reciprocity, and will give full faith and credit to the judgment of a foreign State, where such foreign State gives full faith and credit to our judgments; and will deny full faith and credit to such foreign judgments only where the foreign State denies full faith and credit to our judgments. (Hilton v. Guyot, 159 U. S. 113; Richie v. McMullen, 159 U. S. 235.)

The effect, to be given in one State to the judgment of a court of another State, is the same as the effect, given by the courts of the State where such judgment was rendered, to that judgment. (Renaud v. Abbott, 116 U. S. 277; Hanley v. Donoghue, 116 U. S. 1.) It is there said (page 3):

"By the settled construction of these provisions of the Constitution and Statutes of the United States a judgment of a State court in a cause within its jurisdiction and against a

defendant lawfully summoned, or against lawfully attached property of an absent defendant, is entitled to such force and effect against the person summoned or the property attached when the question is presented for decision in a court of another State as it is in the State in which it was rendered."

And again it is said:

"Judgments recovered in one of the States of the Union, when proved in the courts of another, differ from judgments recovered in a foreign country in no other respect than that of not being re-examinable upon the merits nor impeachable for fraud in obtaining them if rendered by a court having jurisdiction of the cause and of the parties." (Page 4.)

The Jurisdiction of the Court Can be Inquired Into.

The jurisdiction of the court can be inquired into. So where a judgment was rendered in New York against two partners, one of whom resided in New York and one in Louisiana, the latter not served, it was held that, notwithstanding a New York statute to the contrary, the judgment against the partner not served and not residing in New York was void. (D'Arcy v. Ketchum, 11 How. 175.)

Thompson v. Whitman, 18 Wall. 464, and Knowles v. Gas Light Co., 19 Wall. 61, follow this case, and there are many others to the same effect, the last case cited holding that it is competent to contradict the return of an officer upon the summons reciting its execution.

As stated above, jurisdiction being present, the judgment can not be avoided by showing that it was obtained by fraud. (Christmas v. Russell, 5 Wall. 290.) Other authorities can of course be cited to the same proposition.

What Process is Necessary.

Process, however, need not be personally served in order that a court may acquire jurisdiction to render a personal judgment. Thus in Knowles v. Gas Light Co., 19 Wall. 61, this court said:

> "We do not mean to say that personal service is, in all cases, necessary to enable a court to acquire jurisdiction of the person. Where the defendant resides in the State in which the proceedings are had, service at his residence and perhaps other modes of constructive service may be authorized by the laws of the State; but in the case of non-residents like that under consideration, personal service can not be dispensed with unless the defendant voluntarily appears."

In Grover & Baker Machine Co. v. Radcliffe, 137 U. S. 297, this court quoted with approval a Maryland case in which it was said:

> "A law which substitutes constructive for actual notice is binding upon persons domiciled within the State where such law prevails, and as respects the property of others there situated, but can bind neither person nor property beyond its limits."

Further this court said:

> "Publicist concur that domicile generally determines the particular territorial jurisprudence to which every individual is subject. As correctly said by Mr. Wharton, the nationality of our citizens is that of the nation, and, by the laws of the United States, they are bound in all matters in which the United States are sovereign; but in other matters their domicile is in the particular State, and that determines the applicatory territorial jurisprudence. A foreign judgment is impeachable for want of personal service within the jurisdiction of the defendant, this being internationally essential to jurisdiction in all cases in which the defendant is not a subject of the State entering judgment; and it is competent for a defendant in an action on a judgment in a sister State, as in an action on a foreign judgment, to set up as a defense want of jurisdiction in that he was not an inhabitant of the State rendering the judgment, and had not been served with process and did not enter his appearance."

In Bersenthal v. Williams, 1 Duval (Kentucky), 331, it was held that suit could be maintained in Kentucky upon a personal judgment rendered in Ohio upon constructive service, the defendant in the judgment being, at the time it was rendered, domiciled in Ohio.

This subject is discussed and there is a good deal of curious learning upon it in the case of Beard v. Beard, 21 Ind. 321. It is there said:

> "In Scotland there seems to have been a practice in early times of summoning debtors to pay debts by blowing a horn; out of which practice arose warrants of horning and judgments of horning were rendered."

It further shows that in an action in England, on one of these "judgments of horning," it was held that they were not repugnant to the principles of universal justice, but were perfectly consistent with the principles of justice. Of course, however, these were judgments obtained against resident citizens of Scotland who were either concealed or temporarily absent.

In the New York case of Hunt v. Hunt, 72 N. Y. 217, it appears that the husband and wife were residents of New Orleans. The wife left the home of her husband and came to New York, the husband continuing to reside in New Orleans. He there obtained a divorce with constructive service of process. The court examined the question as to whether the wife had good ground for leaving the husband, and finding that she had not, held that the judgment for divorce was valid. We do not cite the case for that point now, but to call attention to what the court said in reference to service of process. We make the following quotation:

> "Where the defendant was a citizen of this State when the marriage was contracted, and is still domiciled here, it is not to be doubted that, as a general rule, such service in such suit is good and sufficient to confer jurisdiction of the person. (This is said in reference to the provision in the New York Code for service of summons upon absent defendant by publication.) It is part of the law of the State of which the defendant is a subject and citizen. That law binding upon him is an assent given by him, that there may and will be acquired jurisdiction over him to hear the case and render judgment affecting, to an extent, his personal rights. As a denizen and citizen of the State he owes it

allegiance, and is under the force and authority of its laws, and as long as he remains in that relation he can not throw off his subjection by the act of temporary or prolonged absence from the State. He is still amenable to its laws, and bound by their provisions as to substituted service of process; and where the case is that of a citizen of another State having his domicile there and judgment against him there on a substituted service such as the law of his allegiance has authorized in the case of an absent defendant, he is bound by it though actually abiding in this State; and when it has been duly made, he is subject in person to the State court duly awarding it." (Hunt v. Hunt, 72 N. Y. 217.)

Constitution and Statute Apply to Judgments in Divorce Cases.

It will hardly be disputed that the rule of international comity or the provision of the Constitution and laws of the United States in reference to the effect of a judgment in one State pleaded in another applies to divorce cases.

In Barber v. Barber, 21 How. 583, a bill was filed by a divorced wife against her husband in the District Court of the United States for the District of Wisconsin, to enforce a decree for alimony. The court, among other things, said:

> "The parties to a cause for a divorce and for alimony are as much bound by a decree for both which has been given by one of our State courts having jurisdiction of the subject-matter and over the parties as the same parties would be if the decree had been given in the ecclesiastical court of England. The decree in both is a judgment of record, and will be received as such by other courts; and such a judgment or decree rendered in any State of the United States, the court having jurisdiction, will be carried into judgment in any other State, to have there the same binding force that it has in the State in which it was originally given. For such a purpose both the equity courts of the United States and the same courts of the State have jurisdiction."

In Cheever v. Wilson, 9 Wall. 123, husband and wife were domiciled in Washington City. The wife went to Indiana and

filed a petition for divorce. The husband answered. The question of the validity of this divorce coming up in certain proceedings, the court held that the decree was valid and effectual according to the law and adjudications in Indiana, and then said:

> "The Constitution and laws of the United States give the decree the same effect elsewhere which it had in Indiana. If a judgment is conclusive in a State where it is rendered, it is equally conclusive everywhere in the courts of the United States."

So in Laing v. Rigney, 160 U. S. 532, there was a decree of divorce and alimony by the Court of Chancery of New Jersey, which was sued on in New York. The New York courts refusing to give the decree for alimony any effect, a writ of error was taken to this court and the judgment reversed distinctly upon the ground that due effect had not been given to the provisions of Article IV of the Constitution of the United States requiring full faith and credit to be given in each State to the judicial proceedings of every other State.

Jurisdiction May Be In Personam or In Rem.

There are two classes of cases where jurisdiction can be asserted: first, where the judgment which is sought is merely a personal one, as in a suit on a promissory note; second, where there is jurisdiction of some thing or actions ordinarily called *in rem.*

If the action is one *in personam* and the court has jurisdiction of the subject-matter and parties, either by personal service or entry of appearance, where the defendant is resident or nonresident of the State where the suit is brought, or by constructive service where the defendant is a resident of the State and either conceals himself or is temporarily absent, and the statutes of the State authorize a personal judgment upon such constructive process—in each of these cases the personal judgment is

entitled, when relied upon in any other State, to the same credit to which it is entitled in the State where the judgment was rendered.

Where the action is one *in rem* and the court has jurisdiction of the *res*, either by its seizure, as in cases of attachment against property, or process of garnishment of credits of the defendant, or for the foreclosure of a mortgage or other lien where the property is within the territorial jurisdiction of a court—in all these cases a judgment, rendered after such constructive process by publication or otherwise, as the Legislature of the State where the suit is brought may prescribe, is equally binding in any other State, where its effect may be called in question.

In other words, jurisdiction of the *res* being present, a judgment of a State court affecting the *res* is as much entitled to full faith and credit as a judgment where the court acquires jurisdiction of the person, and renders a personal judgment.

This is clearly apparent from the whole course of the opinion in the leading case of Pennoyer v. Neff, 95 U. S. 714, where the subject is fully treated.

What Faith and Credit Has This Judgment in Kentucky?

The question as to what faith and credit Kentucky gives to this judgment or one similar to this, is easily answered.

The Court of Appeals of Kentucky has held that where a husband left that State, abandoning his wife, his wife remaining could proceed against him as a non-resident by warning order and the appointment of a representing attorney, and procure a divorce from him. The court said:

> "It would be a reproach to our legislation if a faithless husband in Kentucky could, by leaving the State, deprive his abandoned wife of the power of obtaining a divorce at home." (Rhyms v. Rhyms, 7 Bush, 316.)

In Hawkins v. Ragsdale, it appeared that one A. S. Hawkins and the appellant were husband and wife, residing in Ken-

tucky, where the husband owned certain lands; that the wife abandoned her husband, that he subsequently removed to the State of Indiana, and there obtained a divorce from the bonds of matrimony by proceeding on constructive service, in compliance with the laws of that State. The husband afterward married in the State of Indiana and died. This was an action by his divorced wife to recover dower in the lands lying in Kentucky and owned by the husband at the time of the separation and divorce.

The court held that A. S. Hawkins, being a *bona fide* citizen of Indiana and resident therein at the time of the proceedings in which the divorce was obtained, the decree severing the bonds of matrimony determined the status of the parties, but did not, by its own force, affect the right to the property in Kentucky; but that by the statute law of Kentucky a divorce barred all claims to curtesy and dower, and that this statute was intended to apply to all valid divorces, no matter by what sovereignty granted; that, therefore, the divorced wife was by the judgment of the Indiana court deprived of all dower in the Kentucky lands. (Hawkins v. Ragsdale, 80 Ky. 353; 44 Am. Rep. 483.)

In Perzel v. Perzel, 91 Ky. 634, a wife sued her husband for divorce *a vinculo*. The parties were married in the State of New York and lived together as husband and wife for five years, when the husband left New York for France. It appeared that prior to the time of the desertion the wife, after her marriage, lived a portion of the time in Covington, Kentucky, with her mother. She was an actress by profession, and during the winter months was engaged on the stage. She seemed to have upon her the support of two children by a former husband, and also the support of her present husband. It appeared that the defendant had no particular domicile. The court held that the wife having a residence in Kentucky was entitled to a divorce, of course by constructive process, as the husband did not appear in the case.

It will not be denied, we believe, that in Kentucky the judgment we plead suffices to entirely destroy the bond of matrimony

which heretofore existed between the parties to this cause. If, therefore, the same faith and credit had been given to this judgment in New York that it is entitled to in Kentucky, it is obvious that Mrs. Atherton's suit must have been dismissed.

Even if an Action for Divorce is in Personam, the Kentucky Judgment is Binding.

We must always keep in mind the precise question at issue in this cause; we mean between the judgment of the State of Kentucky upon the one side, and the right of the courts of the State of New York upon the other to disregard that judgment. It is indisputable—indeed, it is found as a fact, that Kentucky was the matrimonial domicile. By that we mean the domicile in contemplation of which the marriage was contracted, and where the husband and wife lived until they separated. The suit was brought by the husband at the matrimonial domicile against the wife who had left that domicile. The husband's ground for divorce was that his wife had abandoned him without his fault. This question the Kentucky court was bound to decide—a question pertinent to the merits of the cause; vital to the judgment. Evidence was introduced in the Kentucky tribunal amply sufficient to sustain its finding. The wife, although having knowledge of the pendency of the proceeding, declined to introduce any evidence; but when the judgment is offered, the courts of New York say it is void because evidence has been introduced in the New York forum to show that the wife rightfully left the husband; and therefore rightfully acquired the New York domicile.

The New York courts do not pretend to say that the Kentucky judgment can be disregarded simply because the wife has come into New York and has lived there. They admit that it is necessary to go further than this and to show that she did this because her husband was in fault. So far from giving full faith and credit to the Kentucky judgment, therefore, absolutely no

credit is given to it at all. Its most vital adjudication is disregarded. The Kentucky court had either the right or it had not the right to decide the question as to whether Mrs. Atherton's abandonment of her husband was without his fault. If it had not the right to decide that question, then there is no question which it did have the right to decide. The Kentucky court is a superior court of general jurisdiction, given the power to determine actions for divorce and to decree them *a vinculo*; and it must have the power to decide whether or not there is cause which will justify such a decree. It is not contended, as we have said, that the evidence was insufficient, but that if the defendant had chosen to put in her evidence the court would have found the other way.

We submit that the adjudication by the Kentucky court, that the abandonment of the husband by the wife was without the husband's fault, must be held to determine this question conclusively. And so are the authorities.

There are, we believe, two cases exactly in point:

In Cheeley v. Clayton, 110 U. S. 701, the divorce was held void because the husband, who had sued in Colorado his absent wife, did not pursue the law of constructive process.

The controversy arose after Clayton's death between two Mrs. Claytons, each claiming to administer on his estate.

It seems that Clayton filed his bill for divorce in Colorado. He there alleged that his wife had been taken by him to Illinois, and had refused to return to Colorado. But the court in which the judgment for divorce was pleaded found as a fact "that the wife was, on the day the suit for divorce was filed and thereafter until the present time, a citizen and resident of the State of Illinois." This court said:

> "Nor do we give any weight to the finding of the court below that the wife at the time of the proceedings for divorce was a citizen and resident of the State of Illinois; for it is hard to show how, if she unjustifiably refused to live with her husband in Colorado, she could lawfully acquire in his lifetime a separate domicile in another State,

or how, if the territorial court had jurisdiction to render the decree of divorce and did render it upon the grounds of her unlawful absence from him, the finding of the court below could consist with the fact so adjudged in the decree of divorce."

It seems to us that language could not be more applicable to the present situation than is this language.

In Hood v. Hood, 11 Allen, 196, the wife sued the husband for divorce in Massachusetts. The husband answered, setting up a divorce which he had obtained from the wife in Illinois. The wife claimed that she had never had any notice of the pendency of the proceedings in Illinois, and that the divorce was obtained there by fraud; that the parties had been married in Massachusetts; had removed to Illinois, and had afterwards separated in Massachusetts by consent. The court held the Illinois judgment valid. Among other things, the court said:

"But this libelant now alleges that the decree for divorce in Illinois was procured by fraud, and the evidence reported has some tendency to show that the separation was by his consent, and so was not the desertion upon which his libel was founded; but the fact of desertion was conclusively settled between these parties by the judgment in Illinois, and it is not now competent for the libelant, the wife, to offer evidence to contradict that judgment."

This case, like the Clayton case, was one where the husband was suing at the matrimonial domicile, and the only service upon the wife was constructive service.

Both these cases, therefore, decide expressly that the finding of the court which rendered the judgment for the divorce that the wife abandoned her husband, can not be contradicted when the judgment is offered in evidence.

If this be so, then as Kentucky was Mrs. Atherton's domicile, she was bound by the substituted service exactly as if she had been served personally in Kentucky.

We suppose that it can not be doubted that wherever a marriage may be contracted, if the husband and wife become there-

after domiciled within a particular State, the law of that domicile controls the dissolution of the marriage. The case here is stronger, because the marriage was made in view of the Kentucky domicile. From Warrender v. Warrender, 2 C. & F. 508, we quote the following out of the argument of counsel:

> "Huber thus lays down the law: '*Non ita precise respiciendus est locus in quo contractus initus est, &c. Contraxisse unusquisque in eo loco intelligitur in quo ut solveret se obligavit. Proinde et locus matrimonii contracti non tam is est ubi contractus nuptialis initus est quam in quo contrahentes matrimonium exercere voluerunt.*'"

And again at page 515:

> "'*Contraxisse unusquisque in eo loco intelligitur, in quo ut solveret se obligavit,*' are the words of Julian in the Pandects."

IF A SUIT FOR DIVORCE IS IN REM THE KENTUCKY JUDGMENT IS CONCLUSIVE.

The Nature of a Suit for Divorce.

What, according to the decisions of this Court, is the nature of a suit for divorce? Is such a suit an action *in personam* or an action *in rem*? The courts of New York seem to consider the marriage tie as a civil contract, not capable of dissolution in any other method than will suffice to dissolve any other personal civil contract. We will hereafter discuss more at length the decisions of this State, but for the present it is sufficient to make the statement as above.

The Supreme Court of the United States is everywhere quoted as holding that marriage is not simply a civil contract, but is a relation and a status, and that the rules under which and the process by which it may be dissolved are quite distinct from those affecting other contracts.

Thus Chief Justice Marshall, in delivering his judgment in the Dartmouth College case, said:

"The provision of the Constitution never has been understood to embrace other contracts than those which respect property or some object of value and confer the rights which may be asserted in a court of justice. It never has been understood to restrict the general right of the legislature to legislate on the subject of divorce." (4 Wheaton, 629.)

In Cheever v. Wilson, 9 Wall. 123, the facts of which we have given above, the court said:

"It is said the petitioner went to Indiana to procure the divorce, and that she never resided there. The only question is as to the reality of her new residence and change of domicile. That she did reside in the county where the petition was filed is expressly found by the decree. Whether this finding is conclusive or only *prima facie* sufficient is a point on which the authorities are not in harmony. We do not deem it necessary to express any opinion upon the point. The finding is clearly sufficient until overcome by adverse testimony. None adequate to that result is found in the record. Giving to what there is the fullest effect, it only raises a suspicion that the *animus manendi* may have been wanting. It is insisted that Cheever never resided in Indiana; that the domicile of the husband is the wife's, and that she can not have a different one from his. The converse of the latter proposition is so well settled that it would be idle to discuss it. The rule is that she may acquire a separate domicile whenever it is necessary or proper that she should do so. The right springs from the necessity for its exercise, and endures as long as the necessity continues. The proceedings for a divorce may be instituted where the wife has her domicile. The place of the marriage, of the offense, and of the domicile of the husband are of no consequence."

If an action for divorce is an action *in personam*, it is obvious that all of this reasoning is merely vain, as domicile has absolutely nothing to do with jurisdiction in personal actions; and surely the court can not have meant that the wife could maintain a suit for divorce without regard to the domicile of her husband only when she can find him personally present in the territory of her own domicile; nor the converse, that the husband can only sue the wife in his domicile when he can find her personally present within that domicile.

In Pennoyer v. Neff, 95 U. S. 734, this court used the following language:

> "To prevent any misapplication of the views expressed in this opinion, it is proper to observe that we do not mean to assert, by any thing we have said, that a State may not authorize proceedings to determine the status of one of its citizens towards a non-resident, which would be binding within the State, though made without service of process or personal notice to the non-resident. The jurisdiction which every State possesses to determine the civil status and capacities of all its inhabitants involves authority to prescribe the conditions on which proceedings affecting them may be commenced and carried on within its territory. The State, for example, has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved. One of the parties guilty of acts for which by the law of the State a dissolution may be granted may have removed to a State where no dissolution is permitted. The complaining party would, therefore, fail if a divorce were sought in the State of the defendant; and if application could not be made to the tribunals of the complainant's domicile in such case, and proceedings be there instituted without personal service of process or personal notice to the offending party, the injured citizen would be without redress. Bishop on Marriage and Divorce, Section 156."

In Cheeley v. Clayton, 110 U. S. 701–705, Mr. Justice Gray, delivering the opinion of this Court, said:

> "The courts of the State of the domicile of the parties doubtless have jurisdiction to decree a divorce in accordance with its laws for any cause allowed by those laws, without regard to the place of the marriage or to that of the commission of the offense for which the divorce is granted; and a divorce so obtained is valid everywhere. (Story, Conflict of Laws, Sec. 230a; Cheever v. Wilson, 9 Wall. 108; Harvey v. Farnie, 8 App. Cas. 43.) If a wife is living apart from her husband without sufficient cause, his domicile is in law her domicile; and in the absence of any proof of fraud or misconduct on his part, a divorce obtained by him in the State of his domicile, after reasonable notice to her, either by personal service or by publication in accordance

with its laws, is valid, although she never in fact resided in that State. (Burlen v. Shannon, 115 Mass. 438; Hunt v. Hunt, 72 N. Y. 218.) But in order to make the divorce valid, either in the State in which it was granted or in another State, there must, unless the defendant appeared in the suit, have been such notice to her as the law of the first State requires."

Again, in Hilton v. Guyot, 159 U. S. 113–167, the same learned judge delivering the opinion of this court, said:

> "A judgment affecting the status of persons, such as a decree confirming or dissolving a marriage, is recognized as valid in every country, unless contrary to the policy of its own law. Coddington's Case, 2 Swanson, 326; Roach v. Garvan, 1 Ves. Sen. 157; Harvey v. Farnie, 8 App. Cas. 43; Cheeley v. Clayton, 110 U. S. 701.
>
> "It was of a foreign sentence of divorce that Lord Chancellor Nottingham, in the House of Lords, in 1688, in Coddington's Case above cited, said: 'It is against the law of nations not to give credit to the judgments and sentences of foreign countries, till they be reversed by the law, and according to the form of those countries wherein they were given. For what right hath one kingdom to reverse the judgment of another? And how can we refuse to let a sentence take place till it be reversed? And what confusion would follow in Christendom if they should serve us so abroad, and give no credit to our sentences.'"

In Maynard v. Hill, 125 U. S. 191, there is a full discussion of the question whether the legislature of the Territory of Oregon had the right, by the passage of a law, to dissolve the relation between a husband and wife; and it was held that such an act of the legislature was valid. The case was that of a husband and wife who were married in Vermont and then went to the State of Ohio to live. The husband left the wife and their child in Ohio and went to the Territory of Oregon, saying when he left that he would either return or would send for his family, and in the mean time contribute to their support. He violated all of these promises, and, without any communication whatever with his wife, and without ever having contributed to her support

from the time he left her, obtained from the legislature of Oregon a law dissolving the bonds of matrimony. This law was held by this court to be entirely within the legislative competence.

With due respect, we submit that it would be impossible to sustain this decision and yet to say that it was not competent for the legislature to give to its courts the power to in like manner dissolve the matrimonial relation existing between one of its domiciled citizens and an absent party.

It is not contended that in any of these cases which we have cited from this court the facts are the same as in the case at bar. Thus in Cheever v. Wilson, 9 Wall. 123, the husband entered his appearance to the wife's suit by filing an answer. In Pennoyer v. Neff, 95 U. S. 714, the case before the court was as to the title to certain real estate levied on under a personal judgment for money rendered on constructive service. In Cheeley v. Clayton, 110 U. S. 701, the judgment for divorce was held void because the statutes of Colorado providing for constructive service had not been followed, and under the decisions of the State of Colorado a judgment rendered upon such defective constructive service was held to be void. In Maynard v. Hill, 125 U. S. 201, the divorce was by legislative act. In Hilton v. Guyot, 159 U. S. 167, the question was as to the validity of a personal judgment rendered in France.

But we insist that these authorities are controlling in a larger sense. They have laid down principles and announced doctrines which can bear no other construction than that which has been given to them by a multitude of State decisions; and that is that the relation of husband and wife is a status which is within the control of the State wherein either party to the relation is domiciled, and capable of being dissolved either by direct legislative action or by judicial proceeding that is effective, even though the notice be not given by the service of process within the territorial jurisdiction of the sovereignty.

In considering the question as to the validity of a judgment where dependent upon personal service, the distinction is not

between actual and substituted service, but between service within the territorial jurisdiction of the court and notice given without the territorial jurisdiction of the court; whether this notice be by delivering a copy of the proceedings personally to the respondent outside such territorial jurisdiction or notifying the respondent by letter addressed to the place of his residence, or by publication in newspaper or otherwise at the place where the suit is brought.

In considering, as a matter of international comity, the validity of a decree even *in rem*, or a decree in reference to a status, it may be that the courts would regard the question whether the substituted service was a fair one—one which was reasonably designed to give the respondent an opportunity to know of the pendency of the proceedings, so that, if he or she desired, defense might be interposed.

In Pennoyer v. Neff, 95 U. S. 727, this court said:

> "Process from the tribunals of one State can not run into another State and summon parties there domiciled to leave its territory and respond to the proceedings against them. Publication of process or notice within the State where the tribunal sits can not create any greater obligation upon the non-resident to appear. Process sent to him out of the State and process published within it are equally unavailing in proceedings to establish his personal liability."

It is quite clear that, outside the territorial jurisdiction of the court, service by newspaper, by letter-carrier, or by a sheriff are all equally good if they conform to the statute prescribing the method of constructive service, and if the method is one free of fraud. 2 Bishop on M. & D., Sections 554, 140, 144; Trubner v. Trubner, L. R. 15 P. D. 24.

It can not be claimed that the method used in Kentucky for informing an absent or non-resident defendant of proceedings taken against him is unfair or even ineffectual for the purposes of communicating knowledge to such defendant. The Code of Civil Procedure requires that an affidavit shall be filed stating

either that the defendant has been absent from the State four months or is a non-resident, and giving the post-office address of such defendant. Thereupon the clerk enters an order warning the defendant to appear and answer at a fixed time—generally sixty days thereafter. At the same time an attorney of record is appointed whose duty it is to communicate to the defendant thus warned, and whose duty it also is to defend the suit if he can not hear from the defendant. In divorce proceedings the allegations of the petition are taken as traversed and must be proved, just as if each of them had been specifically denied.

The steps to be taken for this sort of constructive service are exactly the same in the case of a defendant who is absent four months and one who is a non-resident.

In the case at bar the petition showed that Mrs. Atherton had been absent from Kentucky for more than four months. The clerk, in entering the warning order, spoke of her as a "non-resident" defendant; but this was a mere clerical misprision. The right name to call her would be the "absent defendant," or, indeed, the "defendant," as no qualifying phrase is called for under our law.

An attorney was appointed; he did write to Mrs. Atherton at her correct address, and put upon his letter the usual request to the post-office authorities to return it if not called for. It was never returned. In the answer of Mr. Atherton in the New York case he expressly alleged the fact that she received this letter and had notice of the pendency of this proceeding. She did not deny this in her reply, nor did she endeavor to deny it upon the witness stand, nor was there any finding of the court in any way to the effect that she was not notified of the pendency of the case.

So that there is here no objection to these proceedings on account of any want of fairness or any want of opportunity to the defendant to come in and traverse the allegations at the matrimonial domicile and to have determined the very right of the matter at the place where above all others it should have been determined.

Opinions of Text-Writers on This Subject.

The treatise of Mr. Bishop on Marriage and Divorce has certainly taken the highest rank, and has been cited in this court and we believe all of the courts of last resort in this country and has received high commendation in England (Brett, L. J., in Niboyet v. Niboyet, Law Reports, 4 Probate Div. 14.)

An examination of Mr. Bishop's book will show that a careful study and analysis of the adjudged cases and of the principles of international comity and interstate obligation leads him to the following conclusions:

First, that the place where the marriage is contracted or where the parties were domiciled at the time it was contracted, or where the offense was committed by either party against the marital obligation, are all immaterial.

Second, that where a divorce is declared by a court in which neither of the parties is domiciled, the judgment is void although both parties may appear. This, of course, is entirely at war with any notion that an action for divorce is a personal action in any of its aspects.

Third, that the wife has the right to acquire a domicile separate from her husband, and, having acquired such domicile, whether with or without any fault upon his part, can maintain an action for divorce at such domicile.

Fourth, that a husband, wherever domiciled, can maintain an action for divorce against his wife wherever she may be domiciled.

Fifth, that a divorce granted upon constructive service of process is as valid as one granted upon actual service of process.

Sixth, that a divorce granted to either husband or wife *a vinculo* is valid wherever presented, and the person so divorced is a single man or woman, as the case may be, in all civilized States.

It is obvious that the case at bar does not call for the decision of many of these questions. Here there has been but one matrimonial domicile; here the offense was committed at the matrimonial domicile, and the suit is here by the

husband at the matrimonial domicile against the wife who has left that domicile.

As a concise statement of the proposition involved, we give the following extract from 2 Bishop on M. & D., Sec. 152, where it is said:

> "Rejecting some judicial dicta not amounting to decision, more or less adverse, and not taking into the account such cases as the early North Carolina one now overruled, the present clear American doctrine, made conclusive by decisions of the court of ultimate resort, accepts *ex parte* divorces pronounced by the court of the applicant's domicile in full compliance with the local law, after its constructive notice to the absent defendant, as adequate everywhere to dissolve or otherwise ascertain the marriage status."

In 1 Greenleaf on Evidence, Sec. 525, the author is discussing the conclusiveness of judgments and the rule that the judgment, in order to be binding, must be one to which both litigants were parties. He says:

> "An apparent exception to this rule as to the identity of the parties is allowed in the cases usually termed proceedings *in rem*, which include not only judgments of condemnation of property as forfeited or as prize in the Exchequer or Admiralty, but also the decisions of other courts directly upon the personal status or relations of the parties, such as marriage, divorce, bastardy, . . . and the like. These decisions are binding and conclusive not only upon the parties actually litigating in the cause but upon all others . . . partly upon the more general ground of public policy and convenience, it being essential to the peace of society that questions of this kind should not be left doubtful, but that the domestic and social relations of every member of the community should be clearly defined and conclusively settled and at rest."

In 2 Freeman on Judgments, 585, it is said:

> "The conclusions which are sustained by a decided majority of the cases are very clearly and correctly stated by Mr. Cooley in his work on Constitutional Limitations, in the following language: 'We conceive the true rule to be

that the actual *bona fide* residence of either husband or wife within a State will give to that State authority to determine the status of such party, and to pass upon any question affecting his or her continuance in the marriage relation, irrespective of the locality of the marriage or of any alleged offense, and that any such court in that State as the legislature may have authorized to take cognizance of the subject may lawfully pass upon such questions and annul the marriage for any cause allowed by the local law. But if a party goes to a jurisdiction other than that of his domicile for the purpose of procuring a divorce, and has residence there for that purpose only, such residence is not *bona fide*, and does not confer upon the courts of that State or country jurisdiction over the marriage relation, and any decree they may assume to make would be void as to the other party.'"

In Black on Judgments it is said:

"In the first place, a proceeding in divorce is a proceeding *in rem*. It is not an action by the petitioner against the defendant, at least not primarily. It is a proceeding by the petitioner to obtain an adjudication upon his or her marital status, which is the *res;* and the person who has the nearest interest in that status, and whose acts are alleged to have given rise to a cause for its dissolution, is named and cited as defendant. In the next place, it is an admitted principle of international law that every State has the sole and paramount right to legislate and adjudicate upon the status of its own domiciled citizens, and to regulate and determine their domestic relations. These two principles will furnish the key to the whole subject. For, accepting them as true, it at once becomes apparent that the jurisdiction in divorce must depend solely upon the domicile of the parties—upon the power to adjudicate upon their status —and not upon any question of service of process.

"If both the married parties are *bona fide* domiciled citizens of a given State, there can be no question of the power of the courts of that State to divorce them. It is immaterial that the marriage was celebrated in another State, and that the laws of such other State do not recognize the cause alleged as sufficient ground for granting a divorce. Wherever the parties go they carry their status with them, and it becomes subject to the jurisdiction of any State in which they acquire an actual domicile. And the causes for

altering or dissolving that status must be determined by the laws of the State which has present jurisdiction over it, not by the laws of the State where it originated. Further, in this case, it is immaterial where the offense was committed which is alleged as ground for divorce. If both parties were domiciled in one State, and the offense charged was perpetrated there, and both afterwards remove to another State and acquire a domicile there, the latter State has jurisdiction to dissolve the marriage on the ground of such offense. Here again it is the law of the State having control of the status which must govern, not the *lex loci delicti*.

"It now remains for us to consider the case in which the petitioner is a domiciled citizen of the State where the proceedings in divorce are taken, and the defendant is domiciled elsewhere. And on the admitted principle that each State has the right to determine the status and the domestic relations of its own citizens, the conclusion appears irresistible that the *bona fide* presence of the *res*—the status of a domiciled citizen—should give its courts jurisdiction. If this were not so, neither of the two States in which the parties are respectively resident, nor both together, could exercise this unquestioned right. But the question, though easily soluble on purely logical grounds, may also be treated as one settled by authority. And the decided weight of authority is in favor of the rule here contended for. In this connection it must be observed that the usual rule, that the domicile of the wife follows that of the husband, does not apply in these cases. For the purpose of petitioning in divorce, she may have a separate domicile. The law will recognize her as having a separate existence, and separate rights and interests, in all cases where the very object of the proceeding is to show that the relation itself ought to be dissolved, or so modified as to establish separate interests, and especially a separate domicile and home.

"If it be conceded that a divorce proceeding is a proceeding *in rem*, it will necessarily follow that actual and personal notice to the defendant is not indispensable. The vital requisite is the jurisdiction of the *res*. And power and authority over the *res*, as we have shown, depends upon the actual and *bona fide* domicile of the petitioner within the State. This being secured, it is immaterial that the other party is only constructively notified of the institution of the proceedings. The citation should be the best that the circumstances permit, and such as will tend to prevent fraud.

But it is by no means necessary that it should be the same as is required to justify a judgment *in personam*. This rule is sustained by a great preponderance of authority, as will appear in the next section.

"Although the foregoing arguments have generally been accounted complete and irrefragable, yet some of the courts, while conceding one or more of the separate points, have refused to accept the conclusion to which the whole line of reasoning logically and inevitably leads. Thus the books exhibit a few decisions, and some dicta, to the effect that a decree of divorce against a non-resident, founded upon a merely constructive service of process, as by publication, is void and of no effect. But some of these cases have been overruled; others have been tacitly repudiated, and the true and fundamental principles governing the question have become more and more clear to the courts and have gained weight with the increasing body of decisions. So that now the rule may be regarded as settled, by the great preponderance of authority, that a decree of divorce pronounced by a competent court, in favor of a *bona fide* domiciled citizen of the State and against a non-resident, where service of process was made by a reasonable constructive notice, and in the absence of any fraud or collusion, is valid and binding both in that State and in all other States." 2 Black on Judgments, Sections 925, 926, 928, 931, and 932.

The English Cases.

There are two cases in the English books which seem to us, in their last analysis, to bear out most fully the doctrine that the jurisdiction to decree a divorce is not a personal one. These are Lolley's case, 2 Rus. & R. C. C. 237, and Shaw v. Gould, L. R. 3 H. L. 55. In each of these cases two English people were married in England. Afterwards they went to Scotland, and during a temporary residence there a divorce was decreed by the Scotch courts. In both cases it clearly appeared that neither the husband nor the wife was domiciled in Scotland at the time of the divorce. In both cases it was held that the divorce was void in England. If marriage is a status, controlled by the sovereignty of the domicile of one or both of the parties

to it, and not controllable by a sovereignty in which neither of the parties is domiciled, then these cases stand on a sure foundation; but if marriage is a civil contract, subject to dissolution by a suit *in personam*, we find it difficult to assign any good reason why the judgment of the Scotch court was not valid in Scotland, and also valid everywhere else in the civilized world.

We do not mean to say that the fact that the parties were neither of them domiciled in Scotland is given by the judges in Lolley's case as the reason for their decision. The fact is that that case has been so much commented upon and the expressions used by the judges in it so much explained that it is difficult now to say exactly what was decided except that Lolley was a bigamist.

In Warrender v. Warrender, 2 Cl. & F. 488, there is a most ample discussion of the question in the House of Lords. In that case it appeared that a domiciled Scotchman married an English woman in England; that the domicile of the parties continued to be Scotch; that they separated in England, under an agreement by which the husband was to maintain the wife.

The husband continued to reside in Scotland. The wife resided abroad—in France, Switzerland, and Italy. The husband brought suit in Scotland against the wife for absolute divorce, alleging a fault in the wife committed in France. The wife was personally served in France. The House of Lords held that the divorce *a vinculo* was valid.

While under what we might call the threat of Lord Lyndhurst that he would call in the judges if this decision was to be considered as impugning that in Lolley's case, Lord Brougham asserted that it did not break in on Lolley's case, and was a decision in reference to the law of Scotland; yet we think it can not be doubted that the case has controlled subsequent decisions in England to such an extent that no case since has attempted to support what was at one time believed to be the doctrine of Lolley's case, that only an English parliament could dissolve an English marriage.

The case of McCarthy v. DeCaix, 2 Cl. & F. 568, has been so thoroughly discredited that no further comment upon it is necessary. Indeed, one can hardly fail to see that Lord Brougham's judgment in this case was influenced more by his anger at the decision in Lolley's case than by any sound reasoning upon his own part.

A case often referred to is Maghee v. M'Allister, 3 Irish Ch. Rep. 604. There Lord Chancellor Blackburn had the case before him of a domiciled Scotchman marrying an Irish woman in England. The husband and wife returned to Scotland, and the wife thus became a domiciled Scotch woman. As we read the case, the parties separated in England, and Mrs. M'Allister did not come back to Scotland. Mr. M'Allister, in Scotland, procured a divorce from her *a vinculo* for desertion and non-adherence. Mrs. M'Allister afterwards married again, and dying both husbands claimed a share of her estate in certain partition proceedings in Ireland. The court held the decree of divorce valid, and that the second marriage, which was solemnized in Scotland, was valid. It does not appear distinctly, in the report, whether the wife was present in Scotland at the time of the divorce, though we infer she was not.

In Harvey v. Farnie, Law Rep., 8 App. Cases, 43, it appeared that one Farnie, domiciled in Scotland, married an English woman in England. The husband and wife returned to Scotland, where the wife obtained a decree of divorce *a vinculo*. Subsequently Farnie came to England and married again, his first wife being alive. The second wife presented a petition praying for a declaration that her marriage was null and void, because the first wife was still alive. All the courts in turn, beginning with the Probate and Divorce Division, then the Court of Appeal, and then the House of Lords, held that the divorce was valid and the second marriage valid. Lord Selborne, Lord Chancellor, among other things, said:

> "Now, I must take the liberty of saying that if this question is to be tested upon principle apart from authority, although it can not be denied that the varying jurisprudence,

and perhaps legislation also, of different countries may and do introduce some undesirable cases of conflict between the laws of those different countries on questions of matrimonial status, yet I should certainly say that in such circumstances as those which exist in the present case the principles of private international law point in the direction of the validity of such a sentence and of its recognition by the courts of other countries. Of course I assume that in the way of that recognition there would not be interposed any positive legislation bearing upon the point, or any positive prohibition of its own law binding upon the court in which the question arises. Upon this point of principle, how does the matter stand? Let it be granted (and I think it is well settled) that the general rule, internationally recognized, as to the constitution of marriage is, that when there is no personal incapacity attaching upon either party, or upon the particular party who is to be regarded, by the law to which he is personally subject, that is the law of his own country, then marriage is held to be constituted everywhere, if it is well constituted, *secundum legem loci contractus*. But that merely determines what in all these cases is the point you start from. When a marriage has been duly solemnized according to the law of the place of solemnization, the parties become husband and wife. But when they become husband and wife, what is the character which the wife assumes? She becomes the wife of the foreign husband in a case where the husband is a foreigner in the country in which the marriage is contracted. She no longer retains any other domicil than his, which she acquires. The marriage is contracted with a view to that matrimonial domicil which results from her placing herself by contract in the relation of wife to the husband whom she marries, knowing him to be a foreigner, domiciled and contemplating permanent and settled residence abroad. Therefore it must be within the meaning of such a contract, if we are to inquire into it, that she is to become subject to her husband's law, subject to it in respect of the consequences of the matrimonial relation and all other consequences depending upon the law of the husband's domicil. That would appear to be so upon principle; and that principle followed out would certainly apply in a case like this, where the domicil into which she has married has never undergone a change, where there has been no divergence or cohabitation or residence, and where the crime was committed in the country both of the domicil and of the forum. It would appear, therefore, that if this question is

to depend on any principle at all, it must be upon the principle of recognizing the law of the forum and matrimonial domicil, when, as in this case, they both concur."

It is to be observed that the House of Lords treated the case throughout as involving the question whether the Scotch courts had jurisdiction of the status by reason of Scotland being the matrimonial domicile and not at all as turning upon any question of personal service within the territorial jurisdiction of the Scotch courts.

A very recent and very thoroughly considered case on this subject is that of Le Mesurier v. Le Mesurier, Law Rep. App. Cases (1895), 517, being a decision of the Privy Council on appeal from the Supreme Court of Ceylon.

In that case the husband brought an action against the wife for divorce in Ceylon. The husband was an Englishman by birth, and married in England a French woman. The parties had always lived in Ceylon, the husband being a member of the Ceylon Civil Service. He had retained, however, his English domicile of origin. Lord Watson, in an opinion which reviews the Scotch and English cases, held that there was no jurisdiction in the Ceylon court. He concludes his judgment in the following language:

"Their Lordships have in these circumstances, and upon these considerations, come to the conclusion that, according to international law, the domicile for the time being of the married pair affords the only true test of jurisdiction to dissolve their marriage. They concur, without reservation, in the views expressed by Lord Penzance in Wilson v. Wilson, which were obviously meant to refer, not to questions arising in regard to the mutual rights of married persons, but to jurisdiction in the matter of divorce: 'It is the strong inclination of my own opinion that the only fair and satisfactory rule to adopt on this matter of jurisdiction is to insist upon the parties in all cases referring their matrimonial differences to the courts of the country in which they are domiciled. Different communities have different views and laws respecting matrimonial obligations, and a different estimate of the causes which should justify divorce.

> It is both just and reasonable, therefore, that the differences of married people should be adjusted in accordance with the laws of the community to which they belong, and dealt with by the tribunals which alone can administer those laws. An honest adherence to this principle, moreover, will preclude the scandal which arises when a man and woman are held to be man and wife in one country and strangers in another.'"

It would seem to us to be too clear for dispute that this language, applied to the case at bar, points to Kentucky as the forum to conclusively determine the matrimonial status of the parties to this cause.

Decisions of State Courts.

There are so many cases in the State courts that we will not attempt to make any thing like a complete statement of them. A few will suffice to show the trend of authority. It will appear that this establishes a doctrine much beyond that which is necessary to a reversal of this judgment.

In Thompson v. State, 28 Ala. 13, it appeared that Allen Thompson was indicted for marrying a second time, having a wife then living. The accused was first married in the State of Alabama; then went to Mississippi, and then to Arkansas, leaving his wife and children. The wife returned to her father's house in Alabama. The husband obtained a divorce in Arkansas upon constructive service of process, and then married a second time. The court held that this judgment of divorce was valid, and dissolved the relations between the husband and wife so that they were no longer such. The court, among other things, said:

> "From the principle thus laid down in these two cases it results that jurisdiction over the question of divorce must be allowed to the courts of domicile, and if the husband has the right to emigrate and acquire a new domicile—which, in this country, no one will deny—as a consequence he must acquire the right of having his matrimonial status controlled by the laws and judicial tribunals of the country of the new

domicile. If the divorce can not be sought in the acquired domicile of the husband, it could only be sought in the tribunals of the country where the wife might happen to be. Wheresoever the wife might wander the husband would be compelled to follow, no matter how flagrant her violations of conjugal duty had been. The obtainment of the divorce would then depend upon the laws of the country where the suit might be brought, and it would thus be in the wife's power to select the country to be sued in."

Again the court said:

"The general doctrine is not intended to be denied in this opinion that decrees and judgments, when attempted to be set up in a different State from that in which they were rendered may not be credited where the court had no jurisdiction of the defendant's person and there was no appearance; but in our judgment that rule does not apply to the decrees for a divorce. The jurisdiction over questions of divorce must be maintained where the party seeking the divorce is domiciled in the country and the proceedings are consistent with the laws of the State in which the party has his domicile. The right of a court, when authorized by the statute of the State, to proceed against the non-resident defendant by publication results necessarily from the existence of the jurisdiction. If it can not proceed on notice of that kind it can not proceed at all, for no other notice can be given, and a denial of the power thus to proceed would be fatal to the jurisdiction."

In James Estate, 99 Cal. 374, there was a contest over administration between two contending widows. Husband and wife had lived in New York and there separated. The husband went to Missouri, and there obtained a divorce by publication, of which his wife had no knowledge. The court held that it was valid everywhere:

"While there is some conflict in the decisions on this point, we entertain no doubt that a decree of divorce which has been regularly obtained in one State by a citizen thereof against a non-resident defendant constructively served with process in the action, and without other notice, and which is valid and effectual in the State in which such decree is rendered, is equally valid in a sister State."

In the case of Dunham v. Dunham, 162 Ill. 589, after suit for divorce had been begun by the husband in Illinois, the wife sued and obtained a divorce in North Dakota, and pleaded it. Held, that proof showed the wife was not a resident of North Dakota, and the judgment was fraudulent. The court recognizes fully the law that if the wife had gone to North Dakota *bona fide* as a resident and obtained a divorce, it would have been binding everywhere. The court said:

> "Marriage, as understood among civilized people, is the union of one man with one woman, and, if valid where celebrated, is valid everywhere; and it would seem to follow from the 'full faith and credit' clause of the Constitution of the United States, and it ought to follow as a matter of logic, and from the comity of States, that where that union is lawfully dissolved in one jurisdiction, where one of the parties is in good faith domiciled, and in honest compliance with its laws, it should be treated as dissolved everywhere (1 Nels. Div. and Sep. 65), though it must not be forgotten that the law favors marriage, and does not favor divorce. It is no sufficient answer to say that a husband or wife in fault may wrongfully leave the other, and, after acquiring a domicile in another jurisdiction, sue for and obtain a divorce without the knowledge of the innocent party. The most sacred relations of life are, from their very nature, capable of the greatest abuses. . . . Besides, it would seem to be a necessary incident to the marriage relation that whenever the parties to it have become separated, and reside in different jurisdictions, the status of marriage of each to the other follows each, and inheres in the jurisdiction in which he or she is domiciled; and, while a bill will not lie for a divorce in favor of a non-resident, or to change his status from a married to a single man, yet when the status of marriage is destroyed in one jurisdiction as to the one there residing, it is necessarily destroyed in the other, for, as well said by Mr. Bishop, 'matrimony can only exist in pairs.' This author, in maintaining that the marriage status may be changed by the jurisdiction where only one of the parties resides, among other things, says: 'The law knows only two forms of status as to matrimony—married, single. A man who has a wife, or a woman who has a husband, is married. One without a husband or wife is not married—is single. And it is immaterial to this proposition whether or

> not either or both were once married, or whether the dissolution of a former marriage was by death or divorce. Taking one party out of the marriage, by whatever means, leaves the other single. A husband without a wife, or a wife without a husband, is unknown to the law.'"

Tolen v. Tolen, 2 Blackford (Ind.), 407; S. C., 21 A. D. 742, is a careful case, showing that it is not material where the parties were married or where the ground of divorce occurred; that the law of the domicile is the rule of decision in an action for divorce. In this case it was the domicile of the wife who had moved from Kentucky, leaving her husband there; and he was proceeded against by constructive process.

In Van Orsdall v. Van Orsdall, 67 Ia. 35, the wife sued the husband for a divorce in Iowa. The husband pleaded a divorce obtained in Nebraska. The parties were married in Iowa, and the wife had at all times since been a resident of that State. On the day the marriage took place the husband left Iowa and became a resident of Nebraska, and obtained a divorce from the wife in that State, notice of the application being personally served on the wife in Iowa. The court, after holding that the divorce was valid in Nebraska, said:

> "This being so, what effect should be given to the Nebraska divorce in the courts of this State? This has been a fruitful subject of discussion by the text-writers and in the courts of this country. It will be conceded that the authorities are not entirely in accord. The whole subject has been exhaustively discussed in text-books and by judges of learning and ability. We therefore do not deem it necessary to state any reasons in support of the conclusion reached, which is that as the divorce granted in Nebraska is valid there it must be regarded as valid here. In support of this conclusion we refer to Chapter 92 of Bishop on Marriage and Divorce and the authorities cited in notes."

In Rogers v. Rogers, 56 Kas. 481, it appeared that the husband and wife lived in Kansas. The husband deserted the wife and went to West Virginia, where he became a resident, and obtained a divorce without the wife's knowledge. Held valid in Kansas.

In Smith v. Smith, 43 La. Ann. 1140, it appeared that the parties were married in Maine and came to Louisiana to live. The wife left the husband and went back to Maine. She sued there and obtained divorce for cause. Held valid in Louisiana, although service was constructive merely.

In Gregory v. Gregory, 78 Me. 187, the court said:

> "Emery, J. Marriage is a civil status. The rights and obligations of the parties are not merely contractual but are fixed, changed, or dissolved by law. In case of a conflict of laws, the *lex domicilii* controls the status of the person, though his contractual or property rights may be subject to other laws. The State has the absolute right to determine or alter the civil status of all its inhabitants, no matter where they may temporarily be, and no matter where the contracts or acts giving rise to such status may have been made or done. Other States or countries will, in this matter, accept without question the decrees of the courts of the home State."

In Harding v. Alden, 9 Greenleaf (Me.), 40; 23 A. D. 549, it appeared that the husband and wife married in Massachusetts. They then moved to Maine. There the husband deserted the wife and went to North Carolina, where he married again. The wife moved to Rhode Island, and there obtained a divorce. Held, that this divorce on constructive process was valid in Maine and everywhere, and the wife could sue for dower in Maine, where it was allowed in lands of a "deceased" or "divorced" husband. The case is a positive one on these lines.

In People v. Dazwell, 25 Mich. 261, it appeared that the husband and wife resided in Michigan. A suit for divorce was brought in Indiana by the one against the other, the defendant entering appearance. Decree was granted. Held, that the proceeding was void because the Indiana court could have no jurisdiction, neither party being domiciled in that State. Cooley, J., says:

> "The subject-matter of a divorce suit is just as much local as the subject-matter of a suit in ejectment. It is the status of the parties permitted, regulated, and controlled by

the law of their domicile which is to be passed upon and determined, and the appearance of the parties in a foreign jurisdiction does nothing whatever towards transferring the subject-matter."

In striking analogy to this decision is the case of Ellenwood v. Marietta Chair Co., 158 U. S. 106.

In Thurston v. Thurston, 58 Minn. 279, it appeared that the parties lived in Minnesota. The husband went to Washington, and after being resident two months sued for divorce, of which he gave the wife notice only by publication. She had no notice in fact. Held, divorce binding in Minnesota, although the law of Washington required one year's residence; that the relations between the parties being of status, the proceeding was equivalent to one *in rem*.

Gould v. Crowe, 57 Mo. 201, was an action for dower. The husband and wife had been married in Missouri. The husband obtained a divorce from the wife in the State of Indiana on constructive process. The court held the divorce valid and barred dower. Among other things the court said:

"A divorce suit is a proceeding *in rem*. The status of husband and wife is the *res* to be acted upon and dissolved by the decree."

Again:

"Every State or sovereignty has the right to determine the domestic relations of all persons having their domicile within its territory, and, therefore, where a husband or wife is domiciled within a particular State, the courts of that State can take jurisdiction over the status and for proper causes act on this *rem* and dissolve the relation. The decree so pronounced is a judgment *in rem*, and when not effected by fraud, it is valid everywhere; and under the Constitution and laws of the United States such decrees are entitled to full faith and credit in all States and Territories."

Again:

"But the married status being acted on and dissolved by the decree, that relation becomes severed and continues so in

all other States and Territories, and the property rights depending alone upon its continued existence must cease not only in the State where the decree is rendered but in all other dominions. After such dissolution neither party can claim rights depending upon its continued existence."

In Felt v Felt (N. J. Chy. 1898), 40 Atl. 436, the husband got a divorce in Utah from the wife, who had always lived in New Jersey, but it appeared that the husband was at the time and twelve months prior thereto a *bona fide* resident of Utah. Held, divorce was valid. The court said:

"It appears sufficiently for present purposes that the complainant herein has always lived in New Jersey. A very learned and elaborate argument was made in her behalf to support the position that a decree of divorce could not be rendered against her in another State, which would be valid and binding in this State, without actual service of process upon her in that State, or her voluntary appearance therein. The ground of this position was that another State could not obtain jurisdiction of her person, for the purpose of a suit for divorce, by publication or service upon her out of that jurisdiction, and hence the decree was a nullity in this State. I am unable to adopt that view. I think it not only fairly covered by authority in this State, but that it had no foundation in reason. Chancellor Zabriskie, in Coddington v. Coddington, 20 N. J. Eq. 264, held that proceedings with regard to the validity or dissolution of marriage are proceedings *in rem* and actually operate upon the matter, and that the power of the court to deal with the marriage relation depends upon the fact of the domicile of one or both of the parties being within its territorial limits, and that, to enable the court to obtain jurisdiction, one at least of the parties must be domiciled within the jurisdiction. Such domicile gave jurisdiction to proceed and determine the status of the parties. In this case it is an admitted fact that the defendant herein was domiciled in the Territory of Utah for one year before, and at the time the suit was commenced by him and the decree rendered against the wife. The power of the court of that Territory to determine his status as to marriage was complete, and its action must be respected by us, provided it has been based upon grounds recognized as sufficient by civilized peoples, and reasonable notice and opportunity to appear

and be heard has been given to the other party interested. The mere residence of the wife in another State can not affect the jurisdiction in that behalf of the court in which the husband is domiciled. To hold otherwise, as has been done by the courts of New York, in the cases cited by counsel, is, in effect, to deny relief to an injured spouse, provided the guilty party is able to escape beyond the jurisdiction of the court before service of process upon him or her. This vexed question, in all its aspects, has been the subject of much diversity of judicial judgment in the various States of the Union; but I think it may now be considered as settled by the great weight of authority in conformity with the view just expressed."

In Cox v. Cox, 19 Ohio St. 415; S. C., 2 A. R. 415, the wife sued the husband for divorce in Ohio. Husband pleaded divorce obtained by him in Indiana. Husband had deserted his wife in Ohio, and she had no actual notice of the proceeding in the court of Indiana for a divorce nor that a decree had been granted. The court said:

"It is not necessary in this case to examine the decisions favoring the doctrine that a foreign decree of divorce is void where the defendant was non-resident, and there was no jurisdiction of his person except by constructive service; nor those which make the validity of such decree depend upon the place of the marriage or of the offense. The statute and the decisions of this State are to the effect that the place of the marriage, of the offense, and the domicile of the defendant are not necessary to jurisdiction. It is sufficient here that the petitioning party has been a *bona fide* resident of the State for the statutory period, and that the suit is instituted in the proper county. 1 S. & C. Stat. 513; Cooper v. Cooper, 7 Ohio, 594; Mansfield v. McIntire, 10 *Id.* 27. The same rule prevails in many of the other States. Harding v. Alden, 9 Greenl. 140; Ditson v. Ditson, 4 R. I. 87; Tolen v. Tolen, 2 Blackf. 407; Thompson v. The State, 28 Ala. 13; Gleason v. Gleason, 4 Wis. 64; 2 Bish. on M. and D., Chap. XL. The ground upon which the validity of these decrees is maintained is that marriage being a relation involving the social status of a party to it, the State of which the complaining party is a *bona fide* resident has the right to determine his matrimonial status; and, in

view of the new relations that may be formed in consequence of the dissolution of the marriage in the State where the decree is pronounced, that public policy requires the recognition of the validity of such decrees in other States."

In Dorsey v. Dorsey, 7 Watts, 349; S. C., 32 A. D. 767, the wife sued the husband for divorce in Pennsylvania. The marriage had taken place there. The parties removed to Ohio and established their domicile there. While in Ohio the husband deserted the wife, who returned to Pennsylvania. Gibson, C. J., dismissed the suit for want of jurisdiction upon the ground that Pennsylvania would not take jurisdiction of a suit for divorce for a ground which had occurred elsewhere. The reasoning of the opinion, however, is an authority with us.

"Transfer of allegiance and domicile is a contingency which enters into the views of the parties, and of which the wife consents to bear the risk. By sanctioning this transfer beforehand, we consent to part with the municipal governance incident to it; but with this limitation, that we part not with the remedy for past transgressions. Barber v. Root, 10 Mass. 265. On any other principle an offending husband might, by a change of domicile, elude the vigilance of the law; for I know not that the remedy would follow him, or that our law of divorce would be executed by a foreign tribunal, even were it provided with the requisite means."

In Hull v. Hull, 2 Strobhart's Eq. (S. C.) 178, it appeared that the parties lived in Connecticut. The husband abandoned the wife, coming to South Carolina to live; she in Connecticut got a divorce by publication. Held, divorce valid in South Carolina.

In Thoms v. King, 95 Tenn. 60, it appeared that the husband and wife lived in Mississippi. The husband sued the wife for a divorce. The wife, by cross-action, asked for alimony, which was granted. The husband then dismissed his bill and deserted the wife and went to Illinois. After his death the wife sued for dower in land in Memphis, Tennessee. Defendants pleaded

a divorce granted to the husband in Illinois. The wife alleged she had never heard of it until pleaded. Record showed service by publication. Held, divorce valid and dower barred.

"The sixth assignment is that the court erred in not holding that inasmuch as said decree was not predicated upon personal service of process but upon substituted process of publication as to Mrs. Thomas, a non-resident of Illinois, the decree would not bar her right of dower in realty situated in this State. In considering this assignment of error it is an immaterial consideration that the Illinois decree was based upon publication and not upon personal service of process upon the defendant. Mr. Black, in his work on Judgments (Vol. 2, Sec. 932), says: 'So that now the rule may be regarded as settled by the great preponderance of authority that a decree of divorce pronounced by a competent court, in favor of a *bona fide* domiciled citizen of the State and against a non-resident, where service of process was made by a reasonable constructive notice, and in the absence of any fraud or collusion, is valid and binding both in that State and in all other States.' See also Section 931. The author, in stating his text, proceeds upon the principle, which is sustained by the weight of authority, that a divorce proceeding is *in rem*, and, if the petitioner has a *bona fide* domicile in the State where the divorce is granted, it is immaterial that the non-resident is only constructively notified of the proceedings. The author states that the citation should be the best that the circumstances permit, and such as will tend to prevent fraud. But it is by no means necessary that it should be the same as is required to justify a judgment *in personam*. The record in this case shows publication for four consecutive weeks, and that a copy of the notice was mailed to the complainant at Natchez, Miss., by the clerk of the court."

The case of Ditson v. Ditson, 4 R. I. 87, can not be done justice to by any excerpt. It is a thoroughly considered and closely reasoned argument to show that a wife domiciled in that State can have a decree of divorce from her husband which must be valid everywhere, although he did not reside there, and the only notice to him was by publication in the newspaper. Judge Cooley says that "upon the whole subject of jurisdiction in divorce suits no case in the books is more full and satisfactory than that of Ditson v. Ditson." Cooley, Con. Lim. 496, note.

The Massachusetts Cases.

The cases in Massachusetts may be examined with interest.

In Harteau v. Harteau, 14 Pick. 181; 26 A. D. 372, Shaw, C. J., delivering the opinion of the court, said among other things:

> "We consider it to be proved that these parties had *bona fide* changed their domicile and become citizens of the State of New York before the desertion charged. Such being the fact, it seems to us to be the same case as if they had never been inhabitants of this Commonwealth.
>
> "The place where the marriage was had seems to be of no importance. The law looks at the relation of husband and wife as it subsists, and is regulated by our laws without considering under what law or in what country the marriage was contracted. The good sense of the thing seems to be, if the statute will permit us to reach it, that where parties have *bona fide* taken up a domicile in this Commonwealth, and have resided under the protection and subject to the control of our laws, and during the continuance of such domicile one does an act which may entitle the other to a divorce, such divorce shall be granted, and the suit for it entertained, although the fact was done out of the jurisdiction, and whether the act be a crime which would subject a party to punishment or not; that after such right has accrued it can not be defeated, either by the actual absence of the other party, however long continued *animo revertendi*, or by a colorable change of domicile, or even by an actual change of domicile; and that it shall not be considered in law that the change of domicile of the husband draws after it the domicile of the wife to another State so as to oust the courts of this State of their jurisdiction and deprive the injured wife of the protection of the laws of this Commonwealth, and of her right to a divorce."

We have given the facts in the case of Hood v. Hood, 11 Allen (Mass.), 196. The opinion in that case quotes the provision of the Massachusetts General Statutes on this subject, as follows:

> "When an inhabitant of this State goes into another State or country to obtain a divorce for any cause occurring here, and while the parties resided here, or for any cause

> which would not authorize a divorce by the laws of this State, a divorce so obtained shall be of no force or effect in this State. In all other cases a divorce decreed in any other State or country according to the laws thereof, by a court having jurisdiction of the cause and both the parties, shall be valid and effectual in this State."

In Ross v. Ross, 129 Mass. 243 (opinion by Gray, Chief Justice), it is said that the passage of this statute affirming the validity of foreign divorces made no change in the law, but, in the words of the commissioners upon whose advice it was first enacted:

> "It is founded on the rule established by the comity of all civilized nations, and is proposed merely that no doubt may arise on a question so interesting and important as this may sometimes be."

It is to be noticed that there are two clauses—one declaring when a decree shall have no force; the other when a decree shall be effectual. The words "jurisdiction of both the parties" may be open to construction. They certainly do not mean simply jurisdiction by service of process within the State which grants the divorce.

In Hood v. Hood, 11 Allen, 196, the divorce was obtained by the husband in Illinois, the only citation being on the wife in Massachusetts, and it was held valid.

In Burlen v. Shannon, 115 Mass. 447, an Indiana divorce in favor of a husband was held valid in Massachusetts although the wife had never been in Indiana.

Hood v. Hood, 110 Mass. 463, was an action for dower by the same Mrs. Hood who was a party to the other case of Hood v. Hood, 11 Allen, 196. To this action for dower the former decree was pleaded. The court said:

> "The decree in favor of her husband dismissing her libel was then forever conclusive against her as between themselves. It severed the relation between them, or, rather, estopped her from averring any thing to the contrary of the

decree in Illinois which purported to sever that relation. The general rule, however, in regard to estoppels of record is that they are good only between the parties of record and their privies. They can not be set up in collateral proceedings between one of those parties and third persons. But the effect of the judgment in this case was to determine the status of the demandant. So far as it did that it is a judgment that is operative and conclusive as to all the world."

It is to be noticed that in the case of Burlen v. Shannon, the jury had found as a fact that the wife had abandoned the husband. Therefore the court held that Mrs. Shannon's domicile followed that of her husband when he went to Indiana.

In the case of Hood v. Hood the same result was reached as we have heretofore pointed out, because the Illinois decree adjudged that Mrs. Hood had deserted her husband without cause, and she was held to be estopped by that finding.

One of the most recent cases upon the subject is that of Loker v. Gerard, 157 Mass. 42. That was an action by the wife for dower. The defense was a divorce by decree entered in Colorado in favor of the husband. The husband and wife were married in Massachusetts. She deserted him, and he subsequently obtained a decree for divorce in Colorado. The only service was upon the wife in Massachusetts. It was conceded that the husband did not go to Colorado for the purpose of procuring a divorce. The court said:

"It is sufficient for the purpose of the case to say that by our decisions, it not appearing that the wife separated from her husband for justifiable cause, her domicile followed his, and that therefore, for the purpose of divorce, the court in Colorado had jurisdiction of both the parties within the meaning of the Massachusetts statute. The fact that our courts grant divorces under somewhat similar circumstances is a reason why, as a matter of comity, we should recognize the validity of this divorce. We are not now required to consider whether the rule of law would not be the same independently of the legal fiction that the domicile of the wife follows that of the husband."

It would seem to be quite clear from the expressions of Shaw, Chief Justice, in Harteau v. Harteau, above cited, that there could be no doubt of the validity of a divorce in a case where one spouse left the matrimonial domicile and the other spouse obtained a divorce from a court of the matrimonial domicile.

Indeed, the case of Shaw v. Shaw, 98 Mass. 158, is a direct authority for the proposition that a woman domiciled in Massachusetts can obtain a divorce *a vinculo* from her husband, domiciled in another State, upon process, not served within the State of Massachusetts.

If this is true, the converse must be likewise true—that a husband domiciled in a State can obtain a divorce from his wife, even though she be elsewhere domiciled, and that such divorce can be obtained upon constructive service.

Certain Cases Supposed to be Contra.

The most elaborate attack upon Bishop's view of this general question is contained in the case of McCreary v. Davis, 44 S. C. 195.

In that case it appears that a citizen of South Carolina married in New York. The husband and wife came to South Carolina to live. The wife left her husband and went to Illinois, where she obtained a divorce in accordance with its laws, but without personal service or appearance of the husband, on a ground not recognized as cause for divorce in New York or South Carolina. It was held that the Illinois judgment was void in South Carolina.

The court, however, cites, without disapproval, the case of Hull v. Hull, 2 Strobhart's Eq. 178. The distinction between the cases is that in the Hull case the wife obtained her divorce at the matrimonial domicile.

Whether this is a sound distinction or not, it shows that even in South Carolina such a divorce as is here pleaded would be valid.

So far as our researches have gone we have found but three cases in which a judgment for divorce at the matrimonial domicile against an absent defendant constructively served has been held not valid. These cases are:

McCarthy v. DeCaix, 2 C. & F. 568. This is a judgment of Lord Brougham's to which we have heretofore adverted, and the decision has been so universally discredited as to no longer be worthy of construction.

In that case the husband and wife had been married in England, but had gone to Denmark to live. In Denmark the husband obtained a divorce from his wife. The question was upon the distribution of his personal estate after his death. It is obvious that this personal estate, according to all rules, was distributable according to the law of his domicile, and therefore to disregard the decree of divorce obtained in the domicile in the distribution of his personal estate was obviously at war with all the principles governing such a subject.

The second case is that of Irby v. Wilson, 1 Dev. & B. (N. C.) 578. In that case it appeared that the parties were married in South Carolina. After some years they moved to Tennessee. The wife abandoned the husband and came to North Carolina. The husband obtained a divorce in Tennessee on publication, and the wife then married again in North Carolina. It was held there her second marriage was void.

This case was certainly discredited if not overruled in State v. Schlachter, 1 Phillips Law (N. C.), 521.

In that case it appeared that the parties were married in New York; then moved to North Carolina. The wife moved back to New York. There she obtained a divorce on publication, and married again and came with her second husband to North Carolina to live. It was held that she could not be indicted for a misdemeanor in living with the second husband.

It is only fair to say that in Arrington v. Arrington, 102 N. C. 491, it is said that the case of Irby v. Wilson has not been overruled; but there was nothing in the Arrington case to call for such a pronouncement.

The third case is the one now at the bar.

We believe that it is not only at war with the authorities everywhere else, but is an extension of the New York doctrine, not warranted even by the preceding cases in that State. This can be shown by a review of the decisions cited by the Court of Appeals in its opinion. They are as follows:

Review of the New York Cases.

Williams v. Williams, 130 N. Y. 193. In this case Mary Williams sued Cornelius Williams for divorce from bed and board. There was a judgment for the plaintiff, awarding alimony, costs, and counsel fees. It was modified and affirmed by the General Term, and then affirmed by the Court of Appeals. The action was based upon the allegation that the husband had abandoned the wife in August, 1882. The husband denied this, and alleged that the wife had abandoned him in 1880. He further set out in his defense a judgment of divorce in his favor from the wife, rendered in the District Court of Ramser County, in the State of Minnesota, in January, 1884. The parties were married in New York in 1879. The husband resided in New York until August, 1882, when he removed to Minnesota. The wife continued to reside in New York, and was, at the commencement of the action, a resident of New York. The summons and complaint in the Minnesota action were personally delivered to the wife while temporarily stopping in Philadelphia. The court found as a fact that the husband abandoned the wife in August, 1882. It appeared that there had been a disagreement between the parties, the wife, through the fault of the husband, leaving him; but before the husband left the State of New York she offered, unconditionally and in good faith, to return to him. He refused to allow her to do this, left New York, and took up his residence in Minnesota.

Under these circumstances the decree of the Minnesota court was held not to be binding upon the wife.

Now, it is to be observed of this case that while both husband and wife were residing in the State of New York the husband abandoned the wife and removed to Minnesota, refusing to allow his wife to go with him; that he obtained his judgment for divorce in Minnesota upon the allegation that his wife had abandoned him in 1880, which was two years before he himself left the State of New York. It further appears that the wife had continued to reside in the State of New York. The husband then, having given his wife a ground for divorce at the matrimonial domicile, abandoned the matrimonial domicile and went off to live in another State, refusing to allow his wife to follow him. She remained at the matrimonial domicile. He endeavored to obtain a divorce from her in the other State in which he had taken up his residence, his ground for divorce being one which did not occur in that State, but which, if it occurred at all, occurred in the State where and when he and his wife were domiciled, and where she had continued to be domiciled.

Rigney v. Rigney (127 N. Y. 408).

This was an action in New York upon a decree obtained by the wife against her husband for alimony in the State of New Jersey. It appeared that the parties were married February 12, 1873, in New York, and continued to reside in New York until January 18, 1877, when they removed to Elizabeth, N. J., where they both resided until January, 1883, when the husband abandoned his wife in New Jersey and thereafter resided in the State of New York, the wife continuing to reside at Elizabeth, N. J. On the 23d of April, 1883, the wife filed a bill in the Court of Chancery of New Jersey for divorce from her husband. On the 4th of August, 1883, the husband appeared to the suit and filed an answer denying the allegations. On the 21st of April, 1886, the wife filed a supplemental bill alleging a ground of divorce that had accrued since the commencement of the suit. A certified copy of an order directing the defendant to answer and of the supplemental bill was served on the defendant in New

York. It was recited in the order directing this service that the defendant (the husband) was then a resident of New York. He did not appear to the supplemental bill, and a decree was taken upon it, finding its allegations true, decreeing a divorce and alimony. This court held that it was necessary, under the laws of New Jersey, for process to have been served upon the supplemental bill; that the appearance to the original bill was not an appearance to that; that a suit for divorce, although not strictly a proceeding *in rem*, was of the nature of such a proceeding or *quasi in rem*, but only in so far as it affected the marital status of the parties; that as to the judgment for alimony and costs, it was a proceeding *in personam*. Therefore the court held that the decree of alimony and costs could not be made the basis of an action in the courts of New York.

This case was, however, reversed by this court. The syllabus in the reported case states "that the New York courts did not give due effect to the provisions of Article IV of the Constitution of the United States, which requires that full faith and credit shall be given in each State to the judicial proceedings of every other State." Laing v. Rigney, 160 U. S. Rep. 531.

In that case a question was raised as to whether there was jurisdiction in the New Jersey court to grant the decree for alimony and costs—the supplemental bill and rule to plead, under which it was granted, not having been personally served.

Mr. Justice Shiras, in the opinion, holds that against the testimony of the expert the finding of the New Jersey court will stand. "So long as this decree stands, it must be deemed to express the law of the State." Opinion of Mr. Justice Shiras, 160 U. S., at page 542.

The reasoning in this case even of New York Court of Appeals, if followed, would lead to the reversal of the case at bar.

De Meli v. De Meli (120 N. Y. 485).

This was an action by the wife for separation on the alleged ground of cruel and inhuman treatment, and a counterclaim by the husband for abandonment and other charges. The action

and cross-action were both dismissed. It appeared that the parties were married at Dresden in March, 1870, and in October, 1881, the wife left her husband at Dresden and came to New York, and in March, 1882, commenced this action for separation. The court found that at the time of the marriage in Dresden and since then, to and including the time of the commencement of the action, both parties were and continued to be residents of the State of New York. The husband had procured a divorce on constructive service of process from the wife in Dresden. This decree was disregarded. The judgment of the court below was affirmed. The court held that if the domicile of the parties had been in Germany the German court would have had the jurisdiction, although the defendant in the action was then absent from the Empire, and did not in any manner appear in the action or proceeding. The court said:

> "In such case the party whose domicile is in a country is subject to its laws, and jurisdiction of his person as well as of the subject-matter may be acquired by the court by means of substituted service in the manner provided, if provision for such purpose is made by its laws, although the party sought to be charged by an action brought against him is then absent from the country and can not be personally served with process within it."

But the court held, as above, that both parties were at the time of the action in Germany residents (that is, domiciled) in the State of New York, and that, therefore, jurisdiction could not be acquired in Germany by substituted process.

The most that can be claimed for that case is that it held that where husband and wife were both resident (that is, domiciled) in the State of New York and happened to be abroad, and the wife, leaving her husband, returned to New York, the husband could not invoke the jurisdiction of the court of the foreign country and by substituted process bind the wife by its decree.

Jones v. Jones (108 N. Y. 415).

In that case the husband brought suit against his wife for divorce in New York, but before this suit was tried the wife obtained a divorce in Texas dissolving the marriage, and pleaded that judgment as a defense. There was a judgment for the wife. The husband appealed; judgment affirmed. The parties were residents and citizens of the State of New York, where they married in 1875. They lived together until 1878, when they separated. The wife went to the home of her parents in the State of New York, and then removed with her parents to the State of Texas, where she remained from that time. The husband answered in the Texas case, and for that reason was held to be bound by its judgment. The court said it would have held otherwise that it was void, but this would be no more than saying that where a husband and wife—residents of the State of New York—become separated, the wife going off to another State and there endeavoring to bring an action against her husband for divorce, without personal appearance, a judgment in such an action will be disregarded.

Cross v. Cross (108 N. Y. 628).

Action by the wife for separation against her husband; judgment for the wife, husband appeals. Among other defenses by the husband was a judgment of divorce obtained by him in Illinois. The opinion is only a memorandum one, and there was no reported opinion in the Supreme Court, General Term. The case is rather obscure. It does appear, however, that when the Illinois judgment was rendered, and during the pendency of the Illinois suit, the wife was domiciled in New York; was not served with process; did not appear in the action, and had no actual notice of its existence until copy of the final decree was served upon her. It was held that the judgment was void. The opinion proceeds:

It is also claimed that the court erred in admitting evidence to show that the defendant (*i. e.*, the husband) was not a resident

of Illinois when he obtained his decree. The jurisdiction of that court was open to assault in spite of the recitals in the judgment, and so it was competent to question the truth of the foreign residence. (Kerr v. Kerr, 41 N. Y. 272.) If the plaintiff had appeared in the Illinois action, or ought to have so appeared, and the question of residence had then been litigated, the decision of the court might have been conclusive; but since no process was served upon her in this State, and she had no notice of the action, she had no opportunity to be heard, and is not bound by the finding of the decree.

The opinion does not show where the separation between the husband and wife occurred. An examination of the appeal book, however, shows that the parties were married in Brooklyn in 1854, and lived there until 1878. The husband then abandoned the wife, and in 1879 went to Illinois, where he brought his suit. Thus it is obvious the case has no application to the one at bar. Moreover, the court calls attention to the fact that the wife had no actual notice of the existence of the suit, and says that if she had appeared, or ought to have appeared, in the Illinois case, the fact of residence there found would have been conclusive. If the court means to say that she ought to have appeared if she had received notice such as is required under the Illinois law for constructive process, then in another feature that case is different from the one at bar.

O'Dea v. O'Dea (101 N. Y. 23).

That was a suit by a husband to declare void his marriage with the defendant, his wife, upon the ground that she had another husband living. It appeared that the woman was a resident of Canada; that she was married in Lewistown, New York, to one K., and lived with him as his wife until January, 1860, when she left him and returned to Toronto, where she continued to reside until 1865. K. moved from New York to Cuyahoga County, in the State of Ohio, and in March, 1864, obtained a divorce from her. She received the summons by mail, and was

present during the taking of several depositions. The divorce was granted in Ohio on the ground of desertion. It was held that the divorce was void, and therefore that the second husband was entitled to the relief asked.

The opinion is *per curiam*. It appears that Judges Ruger, Rapallo, Andrews, and Earl voted for it; Miller, Finch, and Danforth against it. It is to be observed that the ground for divorce accrued in the State of New York while both husband and wife were there domiciled; that the husband moved to Ohio and there obtained his divorce. It is hardly to be imagined that the court would have held to the same view if K., instead of going from New York to Ohio and getting his divorce, had obtained it in New York, where both he and his wife were domiciled when the cause of action accrued; and it is hardly to be imagined that the court would have held that under such circumstances he would have been prevented from obtaining his divorce by the fact that his wife in abandoning him had gone to Canada; yet, to make that case square with the one at bar, a divorce obtained by K. in New York, where he and his wife were domiciled at the time the cause of action accrued, must be held to be ineffectual by reason of the fact that his wife had removed to Canada, although in exactly such a state of case the law of New York provided for constructive service of process.

People v. Baker (76 N. Y. 78.)

This was an indictment for bigamy. It appeared that the defendant Baker was married in 1871 to Sallie West in the State of Ohio; that in November, 1874, while she was still living, he married Eunice Nelson at Auburn, New York. The first wife obtained a divorce from Baker in the State of Ohio. It appears that after the marriage between Baker and Sallie West, the husband and wife resided at Rochester, in New York, and that he continued to reside in that State until after the final judgment of divorce was rendered. Under these circumstances it was held that the judgment for divorce was void as to Baker, and that he remained a married man.

Here again it is to be observed that the cause of action accrued in New York while the husband and wife were domiciled in New York, and that the wife, instead of suing Baker in New York, left that State and went to Ohio, where she sued him, serving him constructively. The court seems to have held that there was no obligation upon Baker to follow his wife to Ohio, and that she had no right to call him there on a ground of divorce which had accrued in New York while he and his wife were there domiciled.

In reference to Hunt v. Hunt (which is the next case we shall notice), the court, in People v. Baker, said that that case was close; that it went upon the grounds built up with elaboration, that both parties were domiciled in Louisiana when the judicial proceedings were there begun, and there continued when the judgment was rendered, and so subject to its laws, including those of substituted service of process; that it was meant to keep the reach of the judgment within the bounds fixed by the facts in that case. Church, Chief Judge, dissented from the judgment of the court.

Hunt v. Hunt, 72 N. Y. 217 (opinion by Judge Folger), comes nearer this case than any other to be found in Court of Appeals reports.

This was an action by the wife for divorce. The defense was that the defendant (the husband) had been divorced from the plaintiff by a judgment of the Louisiana court. It appeared that the husband and wife were married in the city of New Orleans, they both being residents and citizens of that State; that they continued to reside in New Orleans until after the 1st of April, 1869, at which time the defendant left the home of her husband and said city and State; that the husband continued to reside in New Orleans, and that he obtained a divorce there by constructive service of process. It was held that the judgment for divorce was valid.

The Hunt case is less strong than the one at bar, because it appears that the divorce was obtained under a law passed sub-

sequent to the time that the wife left the State of Louisiana and came to the State of New York.

It is of course contended that this case is limited by the observation of the court to the effect that the wife, in abandoning her husband in Louisiana and in coming to New York, did so in the absence of any conduct on his part which would authorize the court to grant her a limited or an absolute divorce; and it was further contended that it was for the New York court in our case to consider the complaint of Mrs. Atherton, and to determine whether she had sufficient ground for abandoning her husband to entitle her to a limited divorce; that having such grounds, she was entitled to a decree in this cause, and to have the Kentucky judgment disregarded.

As we have argued above, the logic of such a contention applied to the case at bar is fatally defective. In Kentucky Mr. Atherton was not allowed to obtain a divorce for the abandonment of him by his wife, unless such abandonment was without fault upon his side. When, therefore, the Kentucky court came to consider Mr. Atherton's complaint, and to pass upon the rights of the parties and the cause of action alleged by him, in order to render a decree in his favor it was bound to ascertain and adjudge not only that Mrs. Atherton had abandoned him, but that she had abandoned him without fault on his part.

It is, therefore, a matter of judgment, and as much a part of the judgment of the Kentucky court as any other thing in it, that Mrs. Atherton's abandonment was without Mr. Atherton's fault. If it was without Mr. Atherton's fault, then obviously she had no ground for an action either for limited or absolute divorce.

To inquire into the history of the lives of the parties in order to ascertain whether Mrs. Atherton is entitled to a limited divorce is one thing; to inquire into these same facts in order to determine that the Kentucky court has no jurisdiction is another thing.

In other words, we believe it to be a thing unheard of to challenge the jurisdiction of a court by showing that its judgment was

erroneous; and that it is going a bowshot beyond this to challenge the jurisdiction of a court by showing that its judgment upon the merits of the action was erroneous, in view not of facts which are proved in that record, but in view of facts which are proved in the new record.

We therefore submit that as the judgment was obtained in Kentucky, where Mr. and Mrs. Atherton were both domiciled during their whole married life, and where they were both domiciled when the cause of action accrued, and where it was necessary for Mr. Atherton, in order to obtain the decree, to prove that he was without fault, and where the proceedings were taken under a law which was in existence during the whole of their married life, and by process which was authorized by law during the whole of their married life, we have a case as strong as it is possible to make it of the jurisdiction of the domiciliary tribunal to declare, according to law and by force of process in existence while the domicile actually existed, the marital status of both parties.

Hoffman v. Hoffman (46 N. Y. 30).

This was an action by the wife for a divorce. The answer set up a decree of divorce obtained by the defendant in the State of Indiana. The only question in the case was as to whether this judgment of divorce obtained by the husband was valid. It was held that it was not valid, because it appeared that at the time the judgment was obtained in Indiana both husband and wife resided in the State of New York.

Kerr v. Kerr (41 N. Y. 272).

This was a contest for administration between two Jane Kerrs, each one claiming to be the widow of Richard Kerr. The question turned up whether Richard Kerr had been divorced from Jane Kerr No. 1. It appeared that he had obtained a divorce in the State of Indiana, but that at the time he brought the suit he was not a citizen of the State of Indiana, but was a citizen and resident of the State of New York, and it was therefore held that the decree of divorce was void.

A brief resume of the cases in New York is as follows:

In the Williams case, the separation occurred while the parties were domiciled in New York, the husband going to Minnesota, refusing to allow his wife to follow him, and there obtaining his divorce.

In the Rigney case, the only doubt was as to the validity of the judgment so far as it was for alimony and costs, *in personam*.

In the De Meli case, while both parties were domiciled in New York, the husband sued in Germany.

In the Jones case, the parties separated in New York, and the wife went to Texas and there sued.

In the Cross case, the parties separated in New York, and the husband went to Illinois to sue.

In the O'Dea case, the parties separated in New York, and the husband went to Ohio to sue.

In the Baker case, the parties separated in New York, and the wife went to Ohio to sue.

In the Hunt case, the parties separated in Louisiana; the husband stayed at home; the wife came to New York, and yet a judgment in favor of the husband, on constructive process in Louisiana, was held valid.

In the Hoffman case, the parties separated in New York, and the husband went to Indiana to sue.

In the Kerr case, the parties separated in New York, and again the husband went to Indiana to sue. Indeed, in both of these cases (the Hoffman and the Kerr cases) it was found that at the time the husband obtained his divorce in Indiana he was a citizen of New York.

That we are not making a distinction which is novel to the administration of the law in these cases by the judgments of courts inferior to the final court will appear from the following:

In Morrison's case, 52 Hun, 102, the husband obtained a divorce from his wife in Ohio (the matrimonial domicile) while the wife was residing in New York, and it was held that the divorce was valid.

This case was affirmed by Court of Appeals.

Matter of Morrison, 117 N. Y. 638.

In the DeGaramo case, 86 Hun, 390, the wife abandoned the husband in New York, and obtained a divorce in Michigan. The divorce was held void.

Matter of DeGaramo, 86 Hun, 390.

In the Campbell case, the husband and wife were residing in Pennsylvania. The husband left Pennsylvania and came to New York. The wife obtained a divorce from him in Pennsylvania, and it was held that the divorce was valid.

Campbell v. Campbell, 90 Hun, 233.

In the Dennick case, the husband and wife were living in Michigan. The husband was brought to New York on an extradition warrant, and here shut up in the State's prison. The wife obtained a divorce from him in Michigan. It was held that the divorce was valid.

Matter of Dennick, 92 Hun, 161.

In the Bell case, the husband and wife were residing in New York. The husband went to Pennsylvania and obtained a divorce from the wife. The court held that the divorce was void.

Bell v. Bell, 4 App. Div. 527.

In the McGown case, the wife separated from the husband in New York and went to Dakota to obtain her divorce, and it was held void.

McGown v. McGown, 1 App. Div. 368.

We submit that up to the decision of our case there was no authority in New York which infringes upon the rule we have heretofore quoted as having been formulated by the Massachusetts commissioners.

Nor is there any ground for saying that the test of validity is the ground of divorce, and whether it is one recognized in New York. It would be easy to show this from the cases.

The extraordinary result of these New York decisions has not gone without vigorous comment in that State. Thus in Davis v. Davis (1893), 2 Misc. R. 549, there was an action by Carrie Guran Davis against Simon Davis to annul the marriage of plaintiff to defendant. Judgment for plaintiff.

In a suit in Massachusetts by this defendant against a former wife, proceeding on a constructive service of process by publication, he obtained a decree of divorce for desertion. That decree was challenged as a nullity, for want of personal service and of an appearance by the defendant therein.

Pryor, J., said:

"As the marriage purporting to be dissolved was not celebrated in Massachusetts, as the defendant in the divorce suit was not domiciled in that Commonwealth, nor was served with process there, nor appeared in the action, it results that, by the law of New York, the judgment against her is of no effect; that she is still the wife of the defendant; and that, by necessary consequence, his marriage with this plaintiff is a nullity. . . . To this conclusion I am compelled, but I am not forbidden to say that my reason revolts against it. By the law of Massachusetts its court had jurisdiction of the defendant in the divorce suit, and the decree of the divorce is valid and conclusive. By virtue of the supreme law of the nation, 'a decree in divorce, valid and effectual by the laws of the State where obtained, is valid and effectual in all other States' (Cheever v. Wilson, 9 Wall. 109), and yet I am to declare this Massachusetts judgment a nullity. And why? Because the jurisdiction of the Massachusetts court rests solely on a constructive service of process by publication; and by the law of New York such service is of no avail. But such constructive service of process is the only foundation of the jurisdiction of this court in the present case; yet, by the law of New York, such service gives jurisdiction to its court, and the judgment I am to render is not only valid, but of so transcendent an efficacy as to impeach the records and cancel the judicial proceedings of another State. In reason, such service of process should be sufficient in both States, or in neither.

"Equally anomalous will be the effect of the judgment of this court on the relation and rights of the parties. In

Massachusetts, not the former spouse, but this plaintiff, is the lawful wife of the defendant; while in New York the former spouse is still the wife of the defendant, and his connection with the plaintiff a crime. Indeed, relying on the nullity of the Massachusetts decree, the former wife has instituted here an action for divorce from the defendant, on the allegation that his marriage with this plaintiff is an adulterous association. The executive of New York may demand from Massachusetts the rendition of the defendant as a bigamist; but can he be a bigamist whom Massachusetts has released from the former marriage? The absurd and mischievous consequences of the present judgment do not relieve me from the necessity of pronouncing it; but perhaps the exposition of them may not be amiss in the prevalent agitation for a uniform system of marriage and divorce. Judgment for plaintiff."

We therefore submit that the judgment now under consideration is opposed to reason, international comity, the constitutional rule of "full faith and credit," the opinions of this court, of all the text-writers, of the cases in England and Scotland, and in every court of the Union (except, perhaps, North Carolina), and is not even warranted by the former adjudications in New York.

There was no Evidence to Support the Finding that Mrs. Atherton was a Resident of the State of New York.

It has been decided many times in this court that as it obtains its jurisdiction to revise the judgment of the highest court of a State by writ of error and not by appeal it can not re-examine the facts found by the State court. The cases, however, have none of them gone to the length of holding that this court is bound by the facts found by the State court as to the Federal questions upon which this court takes jurisdiction.

In the case at bar the Kentucky decree adjudged that Mrs. Atherton had abandoned Mr. Atherton without his fault. The New York courts, in order to get rid of that judgment, and as a necessary element in their process of destruction, reversed this finding and declared that Mrs. Atherton had good ground for leaving Mr. Atherton—such good ground as entitled her to acquire a separate domicile.

Surely, when we come to this court to insist upon full faith and credit being given to the judgment of the Kentucky court we can not be turned away with the statement that so far from the Kentucky judgment being conclusive, the New York judgment, in its findings of fact, is conclusive upon the point that the Kentucky judgment is not conclusive.

It seems to us to be clear that the question of fault between Mr. and Mrs. Atherton was set at rest by the Kentucky judgment; but if this is not true; if, under the guise of ascertaining whether the Kentucky court had jurisdiction, the New York court can examine the facts lying at the basis of the Kentucky judgment, then surely we must be able to come here and show that the evidence admitted by the New York court and held to be sufficient to destroy the jurisdiction of the Kentucky court was neither competent nor sufficient for that purpose.

Two propositions must be considered established before the New York rule can be applied:

These are, first, that the wife had the right to acquire a separate domicile. Second, that she did in fact acquire a new domicile. To ascertain the first the New York court inquires into the facts and circumstances of the married life of Mr. and Mrs. Atherton. A just conclusion upon this subject can be reached by a tribunal sitting in Kentucky or by a tribunal sitting in New York. It is obvious that if Mr. Atherton were to choose the tribunal, he would select the one which was held in a State where he was born and where he had lived all his life through. Mrs. Atherton, on the contrary, would select one in which she was born and where she had lived the most of her life. Two judges, equally intelligent and equally just, might differ in their conclusions upon such a subject as this, and this difference might have its foundation in the reputation of the one party or the other in the community where the judge was sitting. This is peculiarly so in a suit for a divorce.

We confess that we were greatly disappointed at the severity of the findings of the trial judge. We do not propose to enter

into an analysis of the testimony upon the subject of the domestic relations of Mr. and Mrs. Atherton. We think, however, that we have the right to ask the court, when it shall have read the findings of the trial judge, to consider two things which seem to us to be most pertinent. One of these is the address delivered by the trial judge to the parties after all the evidence upon Mrs. Atherton's side was in, and before Mr. Atherton had completed his statement. This address is at pages 98 and 99 of the Record.

How the trial justice, having said what he there said, could afterwards make the findings of fact which he did make passes our comprehension.

Again we ask the court to read the evidence of Mrs. Atherton at page 24 of the record—what she says occurred on April 23, 1890; and to read what she says in her complaint occurred March 21, 1890, April 18, 1890, and April 23, 1890 (Record 184–185), and then to read the letter which she admits she wrote on April 24, 1890. (R. 24.)

From the opinion of the Supreme Court, General Term, we make the following extract:

> "Although a very extensive argument has been addressed to this court upon the subject of credibility of the plaintiff as a witness in her narration of the scenes and events and misfortunes which attended her in her married life, we are pressed to say that her statements thereof are 'most uncandid,' and that 'strong side light' is thrown against her by letters written, and her testimony somewhat shaken by witnesses who speak in behalf of the defendant, as to some of the important transactions that she relates, and in others she has, to some extent, colored and magnified them; still, considering the evidence which tends to corroborate her, and, to some extent, tending to establish important facts involved in the numerous inquiries that were opened at the trial, we are inclined to accept the conclusions of fact upon the essential features of the case as found by the Trial Court."

We feel that justice to Mr. Atherton compels us to make at least these references to the Record. With them we will leave

this subject and consider the evidence as to whether, assuming Mrs. Atherton had the right to change her domicile, she did in fact become domiciled in New York and was there domiciled at the time the Kentucky suit was brought.

Mrs. Atherton's domicile and actual residence was in Kentucky up to October, 1891.

There was no evidence whatsoever to justify the findings "that the plaintiff resided in Clinton; that she left Kentucky for the purpose and with the intention on her part not to return to but permanently become a resident of and reside in the State of New York, and that the purpose and intention was thoroughly understood by the defendant at the time. . . . That her intention of not returning to the State of Kentucky, but to permanently reside in the State of New York, was contemplated and evidenced by the said agreement entered into between the plaintiff and the defendant." (R. 221.)

The only positive testimony on the subject was the testimony of Mrs. Atherton, as follows:

> "I remained at the Galt House, I think, about ten days, and then returned to my mother at Clinton, and have lived with her ever since; that has been my residence since; my mother has a lovely place. . . . I went to my mother with the intention of making that my home; that has been my home; has been practically my home, and that was my intention at that time." (R. 18.)

The fact is her mother had rented out her house, and Mrs. Atherton, leaving Louisville October, 1891, did not set foot in Clinton until May, 1892. (R. 57.)

From this evidence there is no basis for the findings above referred to, especially the one taken in connection with the facts which led to her departure from the State of Kentucky.

The trial justice erred in finding that her intention to permanently reside in the State of New York was contemplated and evidenced by the agreement entered into between the parties.

The agreement is absolutely silent upon the subject. (Agreement R. 174.)

Nor can such inference be drawn from its terms. The preamble expresses the intention of preserving the rights of each of the parties, and in this was included, in case of a continued abandonment by the wife of the husband, his right to procure a divorce.

Nor can any such inference be predicated from the fact that under Paragraph II provision is made for the expense of conveying the child, with a proper attendant, in the journey to its mother and back again. (R. 174.)

This provision is not inconsistent with a residence by the mother at some other point in Kentucky; nor is it inconsistent with the probability of the mother's traveling with the child during summer months, to watering-places, or elsewhere, for recreation and other purposes. No reference whatsoever can be spelled out to the mother's going to New York rather than to Washington, to Florida, or to any other place of temporary sojourn.

When a wife separates herself from her husband, there is no law by which he can restrain her movements. He can not put her in jail, nor issue a writ of *ne exeat*. He can agree that if she happens to be in a different place from him he will pay the expense of conveying his child from that place to the place where he is, and of returning the child to the same place or a different one.

This evidence in regard to Mrs. Atherton's departure from Louisville, and as to what was her intention, or the husband's intention, or the husband's agreement, or his acquiescence, are founded entirely upon the untenable proposition that he had the right to control her movements. No man can be said to consent to that which he has no power to prevent. Whatever our former notions may have been in regard to the right of a husband to the forcible caption and retention of the body of his wife, they have certainly been exploded by a celebrated case in England, where it was held that upon the husband's attempting to restrain the freedom of his wife she was entitled to the writ of *habeas corpus*.

Queen v. Jackson, L. R. (1891), 1 Q. B. 671.

In Warrender v. Warrender, 2 C. & F. 488, it appeared that at the time the husband and wife separated there was an agreement of separation by which the husband was to maintain the wife. Accompanying the agreement but not as a part of it, the husband delivered the following letter to the trustees in the articles of separation:

> "My Lord and Sir:
>
> "Although I have objected to having any clauses inserted in the articles of separation between Lady Warrender and myself which should contain a permission from me to her to go and reside where she pleases, or which should preclude me from suing her in the Ecclesiastical Court for restitution of conjugal rights, I hereby pledge myself that Lady Warrender shall be at liberty, during our separation, to go and reside where she pleases, and that I will not institute any suit against her for the purposes mentioned.
>
> "I am, etc.,
>
> "G. WARRENDER."

And yet it was held in that case that this paper in no way affected the question of the right of the wife to acquire a domicile separate from her husband or his right to maintain an action for divorce against her at the matrimonial domicile.

In the agreement it is expressly provided that the domicile of the child is to be the State of Kentucky, and so far from an inference being drawn that the domicile of the mother shall be in another place, the inference should be exactly the other way.

We respectfully urge that the contrary is the fair and legal inference to be drawn, *i. e*, that the domicile of the father and of the child—the marital domicile—shall continue to be the domicile of the mother.

The statement by the clerk of the court that in the Kentucky action Mrs. Atherton was proceeded against as a non-resident is a mere inadvertent expression, and is but a clerical error. The petition and affidavit is simply that she has been absent from the State four months. (R. 150.)

She was treated and regarded as an "absent defendant," and so adjudged. (R. 152.)

In the reply of Mrs. Atherton to the answer in this action (which sets forth the agreement) Mrs. Atherton positively avers that she was induced to sign the agreement, and it was stated and represented to her "that such agreement was not and would not be permanent, and that it was intended to be and would be a mere experiment and temporary arrangement." (R. 219.)

"But for the fact that she understood and believed that the agreement would not be permanent; that it was intended to be and would be merely an experiment and temporary arrangement . . . this plaintiff would not have consented to sign and would not have signed the said agreement."

"That at the time the said agreement was signed it was not intended or understood, by any of the parties to the said agreement, that such agreement was or would be permanent, but that it was intended and understood by such parties to be merely temporary and experimental." (R. 220.)

In her testimony on the subject she said that her understanding was that the contract was an experiment, and was to last a year only. (R. 147.)

Thus her own testimony is wholly inconsistent with her making or having made a permanent or any change of residence. Although she went to Clinton to her mother, it could not be that she contemplated a change of residence.

These positive, solemn, and formal allegations made in her pleading in this action are consistent:

1. With the presumption of law as to her marital domicile.
2. With the actual facts as to her place of residence.
3. They are confirmed by her own testimony, and in the whole case there is nothing to justify the finding that she permanently or at all changed her place of residence.

The findings, therefore, that Mrs. Atherton ceased to be a resident of the State of Kentucky, being without evidence to support them, must fall. The true doctrine is that laid down in the Le Mesurier case, above cited, L. R. App. Cases (1895), 517, that domicil in such a connection as this means not residence

nor abiding place, but that country which on the death of the party would control the succession of his property, hence the country which there is a fixed intention to hold as the place of one's citizenship. And the case of Shaw v. Shaw, 98 Mass. 158, and many others prove that a new domicil is not obtained by merely abandoning the old with the intention of acquiring the new domicil. It must be actually acquired before there is a change.

The Decree For Alimony.

In New York a suit for alimony can not be brought as separate from an action for divorce. Therefore when it appeared that Mr. Atherton was not Mrs. Atherton's husband, Mrs. Atherton's complaint should have been dismissed, and would have been dismissed if such had been the conclusion of the New York Court. Ramsden v. Ramsden, 91 N. Y. 282.

CONCLUSION.

Mr. and Mrs. Atherton separated in October, 1891. The agreement which was at that time made between them as to the custody of their child we have given in the early part of this brief. It will hardly be contended that Mrs. Atherton has even made an effort to live up to that agreement. Singularly enough, the New York Court of Appeals finds in the conduct of the parties an abandonment of the agreement. Thus the court said:

> "We are of opinion that the suit for absolute divorce brought by the husband in Kentucky in December, 1892, and the action for limited divorce instituted by the wife in this State in January, 1893, both having proceeded to judgment, may be regarded as a mutual abandonment and termination of the agreement under its terms, and left the court below free to act as it deemed proper respecting the alimony of the wife and the custody and maintenance of the child."

The agreement expressly provides for just such a contingency as the learned court declares evidences its abandonment. We do not, of course, claim that it is a Federal question as to what the New York courts shall do with the child. It is within the territorial jurisdiction of those courts, and the power belongs to the courts to control the custody. There is, however, we think, something wrong somewhere to produce such scant comity. The judgment of the Kentucky court was absolutely disregarded by the New York court. Mr. and Mrs. Atherton solemnly agreed that each was to have companionship of this child. They live in different States. They agreed that the domicile of the child should be the State of Kentucky. All this is answered by the Court of Appeals in one sentence. It says:

> "The husband and wife had sought relief in the courts, and the interests of the child were safe with the Supreme Court of the State guarding her rights."

We may ask, would the interests of the child have been less safe if the courts of Kentucky had been left to guard her rights?

The simple fact is that the New York court so much fears that the Kentucky court will not require Mr. Atherton to allow Mrs. Atherton her fair share in the companionship of the child that they remove all temptation to injustice by the Kentucky courts through the simple expedient of depriving Mr. Atherton of all share in such companionship.

We respectfully submit that the judgment in this case should be reversed.

ALEX. POPE HUMPHREY,
GEO. M. DAVIE,
Counsel for Plaintiff in Error.

APPENDIX.

OPINION OF NEW YORK COURT OF APPEALS.

MARY G. ATHERTON, - - - - - - *Respondent,*

VERSUS

PETER LEE ATHERTON, - - - - - *Appellant.*

1. Husband and Wife—Domicile; Divorce. A married woman may acquire a separate domicile in another jurisdiction than that of her husband's domicile when it is necessary for her to do so by reason of his conduct, such as cruel treatment entitling her to a limited divorce.

2. Separate Domiciles in Different Jurisdictions—Wife's Action for Limited Divorce in this State Not Barred by Decree of Absolute Divorce Obtained by Husband in State of his Domicile, Void for Want of Jurisdiction of Person. Where, in an action brought in this State by a wife whose husband's domicile is in another State for a limited divorce on the ground of cruel treatment, the husband appears, and it is found, by findings binding upon the Court of Appeals, that the wife had changed her domicile from that of her husband to this State, by reason of his cruel treatment, and that the alleged cruelty had been committed, the wife's action, on appeal from an affirmance of a judgment in her favor, is not to be deemed barred by a judgment of absolute divorce obtained by the husband in the State of his domicile, in an action brought by him subsequent to the wife's change of domicile, in which she was only constructively served as an absent resident and did not appear; but such judgment of the other State, having been rendered without acquiring jurisdiction of the person of the wife, is void as to her, and without effect in this State.

3. Judgment of Another State—United States Constitution. The provision of the Constitution of the United States (Article IV, Section 1) requiring each State to give full faith and credit to the judicial proceedings of every other State, has no application to a judgment for divorce shown to have been rendered without acquiring jurisdiction of the person.

4. Agreement Between Separated Husband and Wife as to Alimony and Custody of Child. An agreement, entered into by a wife, her trustee, and the husband, after reciting that the principals had ceased to live together as man and wife, and that the agreement was not to prevent "any consequences which may follow, or right which may arise to either party, if such status shall continue," provided for the custody and maintenance of their child, and for alimony to the wife, and stated that the divorce of either party should terminate the agreement. Held, that the agreement was mutually terminated, under its terms, by the recovery of a judgment of absolute divorce by the husband in the State of his domicile, and by an action for limited divorce brought by the wife in this State, where she had acquired a separate domicile, with the effect of leaving the trial court of this State free to act as it deemed proper respecting the alimony of the wife and the custody and maintenance of the child.

Atherton v. Atherton, 82 Hun, 179, affirmed. (Argued January 21, 1898; decided March 1, 1898.)

Appeal from a judgment of the late General Term of the Supreme Court in the fourth judicial department, entered January 14, 1895, affirming a judgment in favor of plaintiff, granting her a limited divorce, entered upon a decision of the court on trial at Special Term.

The facts, so far as material, are stated in the opinon.

Alex. P. Humphrey and Simon W. Rosendale for appellant. The Kentucky judgment is a bar to this action. (U. S. Const. Art. 4, Sec. 1; U. S. R. S. Sec. 905; Pennoyer v. Neff, 95 U. S. 914; Arndt v. Griggs, 134 U. S. 316; Lynch v. Murphy, 161 U. S. 247; Nelson on Divorce, Sec. 28; 2 Kent's Com. 460;

Scudder v. U. Nat. Bank, 91 U. S. 406; L. & G. W. S. Co. v. P. Ins. Co., 129 U. S. 397; Pritchard v. Norton, 106 U. S. 124; Rigney v. Rigney, 127 N. Y. 408; Laing v. Rigney, 160 U. S. 531; Ditson v. Ditson, 4 R. I. 87; 10 Abb. (N. C.) 333; Maynard v. Hill, 125 U. S. 190; Kinnier v. Kinnier, 45 N. Y. 535.) There was no evidence to support the finding that the plaintiff, Mrs. Atherton, was a resident of the State of New York. (Queen v. Jackson, L. R. 1 Q. B. 671; Code Civ. Pro., Sec. 1763; de Meli v. de Meli, 120 N. Y. 485; Dupuy v. Wurtz, 53 N. Y. 556; Hart v. Kip, 148 N. Y. 306; Story's Conflict of Laws, Sec. 744; Whart. Conflict of Laws, Sec. 490; Warrender v. Warrender, 2 Cl. & F. 488; Dolphin v. Robbins, 7 H. L. C. 390.) There is error of law in the decree as to alimony for plaintiff and in its provisions for the support of the child. (Carpenter v. Osborn, 102 N. Y. 552; Clark v. Fosdick, 118 N. Y. 7; Galusha v. Galusha, 116 N. Y. 635; 138 N. Y. 272; Duryea v. Bliven, 122 N. Y. 567; People v. Sternberger, 153 N. Y. 684; Allan v. Affleck, 64 How. Pr. 380.)

William Kernan and A. M. Mills for respondent. It is sufficient to authorize the interposition of the court to grant a separation that there be ill-treatment and personal injury, or a reasonable apprehension of personal injury. (Whispell v. Whispell, 4 Barb. 217; Davies v. Davies, 55 Barb. 130; Byhin v. Byhin, 17 Abb. Pr. 20; Uhlmann v. Uhlmann, 17 Abb. (N. C.) 236; Lutz v. Lutz, 31 N. Y. S. R. 718; Straus v. Straus, 67 Hun, 491; Waltermire v. Waltermire, 110 N. Y. 183; de Meli v. de Meli, 5 Civ. Pro. Rep. 306; Evans v. Evans, 1 Hagg. Const. 35; Mason v. Mason, 1 Edw. Ch. 278.) The decree of divorce in Kentucky in favor of the defendant is no bar to this action. (Beckwith v. Beckwith, 24 Wkly. Dig. 5; Kerr v. Kerr, 41 N. Y. 272; Hoffman v. Hoffman, 46 N. Y. 30; People v. Baker, 76 N. Y. 78; O'Dea v. O'Dea, 101 N. Y. 23; Jones v. Jones, 108 N. Y. 415; Cross v. Cross, 22 Wkly. Dig. 309; 108 N. Y. 628; de Meli v. de Meli, 120 N. Y. 485; Rigney v. Rigney, 127 N. Y. 408; Williams v. Williams, 130 N. Y. 193;

Matter of De Garamo, 86 Hun, 390; People v. Karlsioe, 1 App. Div. 571; Bell v. Bell, 4 App. Div. 527.) Upon the findings of fact by the court the plaintiff had the legal right to change her residence and domicile from the State of Kentucky to the State of New York as she did, and was and is entitled to the decree granted to her. (2 Bishop on Mar. and Div. Sec. 125; Cheever v. Wilson, 9 Wall. 108; Hunt v. Hunt, 72 N. Y. 217; Rundell v. Van Inwegan, 9 Civ. Pro. Rep. 328; Mellen v. Mellen, 10 Abb. (N. C.) 329; Dupuy v. Wurtz, 53 N. Y. 556; Prentiss v. Butler, 37 N. Y. S. R. 605; Bassett v. Wheeler, 84 N. Y. 466; de Meli v. de Meli, 120 N. Y. 486; Phelps v. N. Y., N. H. & H. R. R. Co., 17 App. Div. 392.) There is no error of law in the decree as to the custody of the child. (People ex rel. v. Mercein, 3 Hill, 400; People ex rel. v. Mercein, 8 Paige, 47; Mercein v. People ex rel., 25 Wend. 64; Matter of Hartman, 23 Wkly. Dig. 128; People ex rel. Brush v. Brown, 35 Hun, 324; Allen v. Affleck, 64 How. Pr. 580; Code Civ. Pro., Sec. 1766; Matter of Waldron, 13 Johns, 418; Matter of Maurer, 18 Wkly. Dig. 568; People ex rel. v. Olmstead, 27 Barb. 9.) There is no error of law in the decree as to the allowance for the support of the child or a to the alimony for the plaintiff. (1 Bishop on Mar. and Div., Sec. 1302; Cropsey v. McKinney, 30 Barb. 48; Griffin v. Banks, 37 N. Y. 621; Galusha v. Galusha, 116 N. Y. 635; Code Civ. Pro., Sec. 1337.)

Bartlett, J. The defendant seeks on this appeal the reversal of a judgment for limited divorce recovered against him by his wife.

The judgment rests upon the finding of the trial court that the defendant had treated the plaintiff in such a cruel and inhuman manner that it rendered it unsafe and improper for her to cohabit with him, and justified her in seeking a separate residence; it gives her alimony and the custody of the only child of the marriage.

The plaintiff, a young lady of refinement and excellent social position, was married, when twenty-two years old, to the defend-

ant at her father's house in Clinton, New York, on the 17th day of October, 1888. The defendant is a young man of good family, a native of Kentucky, and at the time of his marriage resided with his parents at the city of Louisville. After the wedding trip the plaintiff and defendant took up their residence at the house of defendant's parents. On the 8th of January, 1890, a daughter was born, and is the only issue of the marriage.

On the 3d of October, 1891, the plaintiff left her husband's house permanently, taking the child with her. On the 10th day of October, 1891, and before her departure for the State of New York, the plaintiff, her trustee, and the defendant, with the advice of counsel, entered into a certain agreement that will be referred to later. Immediately thereafter the plaintiff departed from the Commonwealth of Kentucky, and came to the State of New York with the intention, as the trial court finds, of changing her residence and domicile from Kentucky to New York.

In the month of December, 1892, the defendant commenced an action against plaintiff in Kentucky for an absolute divorce, alleging that she had abandoned him in the month of October, 1891, without fault on his part, and such abandonment had continued uninterruptedly for the period of more than one year.

Under the statutes of Kentucky the proof of this state of facts entitles a plaintiff to a decree dissolving the bonds of matrimony. The defendant was not served with process in Kentucky, nor did she appear in the action.

The decree of divorce was obtained upon the assumption that the defendant was a resident of Kentucky who had been absent therefrom for four months, and could, therefore, receive notice of commencement and pendency of the action by a designated constructive process.

The plaintiff made his formal proofs, and in the absence of the defendant the Kentucky decree was entered about March 14, 1893.

The wife began the present action for a limited divorce on the ground of cruel and inhuman treatment in January, 1893, and the trial court rendered judgment in her favor in June, 1893.

The husband appeared in this case, was represented by able Kentucky and New York counsel, and the issues were thoroughly tried.

The principal question presented by this appeal is whether the Kentucky decree is a bar to this action, the defendant having set it up in his answer. The plaintiff attacked this decree on the ground that it was entered by a court having no jurisdiction of her person, she being at the time the Kentucky action was begun and the decree therein entered a resident of the State of New York.

On the other hand, the defendant insisted that his wife was at the time referred to a resident of Kentucky, and consequently bound by the decree. This was one of the issues tried and decided in favor of the wife.

The learned counsel for the defendant from Kentucky argued with great earnestness and ability that the matrimonial domicile of the wife is that of her husband, and consequently we are compelled by the Constitution of the United States to give full faith and credit to the decree in her husband's favor. (Art. 4, Sec. 1.) In view of the fact that we have a finding fixing the wife's domicile in this State, we are of opinion the Kentucky decree is void as to her under the law, as well settled in this jurisdiction.

It is undoubtedly true that the matrimonial domicile of the wife is that of her husband, but this general rule has its exceptions.

In this case we have the finding that the plaintiff was justified in leaving her husband, and that her sole reason for so doing was his cruel and inhuman treatment.

This court said, in Hunt v. Hunt (72 N. Y. 217), in speaking of the general rule as to the wife's domicile (at page 242):

> "There are, however, exceptions to the rule, one of which is invoked by the plaintiff in this suit, so that in certain cases a married woman may have a domicile in another jurisdiction than that of her husband. This is so when they are living apart under a judicial decree of separation, or when the conduct of the husband has been such

as to entitle the wife to an absolute or limited divorce. She may acquire a separate domicile whenever it is necessary for her to do so. But the right to do so springs from the necessity for its exercise."

In the case at bar we have the undoubted right of the plaintiff to change her domicile under this rule, followed up by the finding that she did so change it to the State of New York. It has been held in many cases that the jurisdiction of the court of another State in which judgment has been rendered is always open to inquiry in the courts of this State; and if that court has exceeded its jurisdiction, or has not obtained jurisdiction of the parties, the proceedings are void. (Kerr v. Kerr, 41 N. Y. 272; Hoffman v. Hoffman, 46 N. Y. 30; Hunt v. Hunt, 72 N. Y. 217; People v. Baker, 76 N. Y. 78; O'Dea v. O'Dea, 101 N. Y. 23; Jones v. Jones, 108 N. Y. 415; de Meli v. de Meli, 120 N. Y. 485; Rigney v. Rigney, 127 N. Y. 408; Williams v. Williams, 130 N. Y. 193.)

We have carefully examined the evidence, and have reached the conclusion that the findings of the trial court as to the issues of domicile of the plaintiff and the cruel and inhuman treatment by defendant of his wife are not without evidence to support them, and because of their affirmance by the General Term they are binding upon this court.

It therefore follows upon the facts and the law that the Kentucky judgment is not a bar to this action.

It remains for us to consider the appellant's points based on the alleged effect of the agreement entered into by the plaintiff, her trustee, and the defendant just prior to plaintiff's final departure from Kentucky.

This agreement bears date October 10, 1891. We do not regard this instrument as technically articles of separation between husband and wife, but rather an agreement to provide for the best interests of the child, made in contemplation of the fact that the parents had separated and were to live in different jurisdictions.

The opening recitation of the agreement refers to the parties as "having ceased to live together as man and wife, without in any way acknowledging upon whom is the fault, or condoning the conduct of one or the other which has led to the existing state of affairs, or preventing any consequences which may follow, or right which may arise to either party if such status shall continue." This language makes it clear that, while the separation was recognized as a fact, the agreement was not to prejudice or affect existing rights of either party growing out of that situation.

The recitation clause further states that the parties desire to provide for the best interests of the child, and with this view they have entered into the agreement. It provides for the alternating custody of the child by her mother and the mother of the defendant; the defendant obligates himself to pay $500 for maintenance of the child during that portion of the year in which she is with her mother; the wife is to receive alimony at the rate of $125 a month, the divorce or second marriage of either party to terminate the agreement; the agreement was to continue as to the child until she was fourteen years of age, and as to her mother until January 8, 1904; if divorce was granted, the provisions as to plaintiff were to be carried into the decree.

There are other details not necessary to mention. We are of opinion that the suit for absolute divorce brought by the husband in Kentucky in December, 1892, and the action for limited divorce instituted by the wife in this State in January, 1893, both having proceeded to judgment, may be regarded as a mutual abandonment and termination of the agreement under its terms, and left the court below free to act as it deemed proper respecting the alimony of the wife and the custody and maintenance of the child. The provision of the agreement for the wife's alimony was not carried into the Kentucky decree, but the judgment in this action provides for the same amount of alimony per month of $125.

It is unnecessary for us to consider any of the questions which are argued in the briefs, resting on the assumption that the agreement was in full force and effect at the time the judgment was entered herein at Trial Term. The husband and wife had sought relief in the courts, and the interests of the child were safe, with the Supreme Court of this State guarding her rights.

The judgment of the General Term should be affirmed, with costs.

All concur except Gray, J., absent, and Martin, J., not sitting.

Judgment affirmed.

Law and Procedure in Divorce Suits in Kentucky.

The defendant, by way of further answer to the complaint herein, says that at and during the time of the matters complained of herein, and of the legal proceedings set forth herein, the following were provisions of the law of the State of Kentucky, in full force and effect in that State, to wit:

"Courts having general equity jurisdiction may grant a divorce for any of the following causes, to both husband and wife, to the party not in fault: Abandonment by one party of the other for one year."

"No petition for divorce shall be taken for confessed or be sustained by the admissions of the defendant alone, but must be supported by other proof."

"Action for divorce must be brought in the county where the wife usually resides, if she has an actual residence in the State; if not, then in the county of the husband's residence; and no such action shall be brought by any one who has not been a continuous resident of this State for a year next before its institution."

"An action for divorce must be brought within five years next after the doing of the act complained of."

These are, and were at the time of all the proceedings herein set forth, the provisions of the General Statutes of the State of Kentucky. All the said General Statutes were adopted

by the Legislature of the State of Kentucky, and approved by the governor thereof, and by their terms were made to and did take effect December 31, 1873, and have continued in force ever since.

The defendant further says that the following were also provisions of the law of the State of Kentucky at and during the time of the acts complained of herein, and the legal proceedings set forth herein, to wit:

"In actions between husband and wife she may sue or be sued alone."

"That plaintiff, to obtain a divorce, must allege and prove, in addition to a legal cause of divorce, a residence in this State for one year next before the commencement of the action; that the cause of divorce occurred or existed in this State; or, if out of the State, either that it was a legal cause of divorce in the State where it occurred, or existed, or that the plaintiff's residence was then in this State; that the cause of divorce occurred, or existed, within five years next before the commencement of this action."

"An action for alimony or divorce shall be in equity."

"An action for alimony or divorce must be brought in the county where the wife usually resides, if she have an actual residence in this State; if not, in the county of the husband's residence."

"Sec. 57. When constructive service allowed—how made. If defendant be: 1. A corporation having no agent in this State, known to the plaintiff, upon whom a summons can be lawfully served; or,

"2. A non-resident of this State, and believed to be absent therefrom; or,

"3. Have departed therefrom with intent to delay or defraud his creditors; or,

"4. Have been absent therefrom four months; or,

"5. Have left the county of his residence to avoid the service of a summons; or,

"6. To conceal himself that a summons can not be served upon him; or,

"7. If his name and place of residence be unknown to the plaintiff;

"The clerk shall, subject to the provisions of Section 58, make upon the petition an order warning the defendant to defend the action on the first day of the next term of the court which does not commence within sixty days after the making of the order."

"Sec. 28. When warning order can be made—affidavit.

"The clerk shall not make such warning order upon any of the grounds mentioned in sub-sections 1, 2, 3, 4, and 7 of Section 57, except upon an affidavit of the plaintiff; or of his agent or attorney, if he be absent from the county; or of his guardian, curator, committee, or next friend if he be under disability; or of the attorney of either of them, if absent from the county, stating the ground of the application for such order.

"2. Nor shall the clerk make such order on any of the grounds mentioned in sub-sections 1, 2, and 4 of Section 57 unless the affidavit also states in what country the defendant, or, if the defendant be a corporation, in what country its chief officer or agent resides or may be found, and the name of the place wherein a post-office is kept nearest to the place where the defendant or its chief officer or agent resides, or may be found; or unless the affidavit state the affiant's ignorance of such of those facts as he does not know.

"3. Nor shall the clerk make any such order upon any affidavit of an agent or attorney of the plaintiff, stating any of the grounds mentioned in sub-sections 1, 2, 4, and 7 of Section 57, unless the affidavit state the affiant's belief that the plaintiff is ignorant of such of the facts as are unknown to the affiant.

"4. The clerk may make such order upon an affidavit of the plaintiff, or of his agent or attorney, if he be absent from the county; or of his guardian, curator, committee, or next friend, if he be under disability; or upon the return of a summons by the proper officer, stating either of the grounds mentioned in sub-sections 5 and 6 of Section 57.

"5. But the clerk shall not make such order upon the affidavit of an agent or attorney unless it also state the affiant's connection with the plaintiff, and the fact that he is absent from the county.

"6. An affidavit made pursuant to the foregoing provisions of this Section, unless it be controverted by the defendant's affidavit, shall be sufficient evidence of the facts therein stated for the support of the action as well as of the warning order."

"Sec. 59. Appointment of attorney—his powers—duty—compensation. The clerk, at the time of making such warning order, shall appoint, as attorney for the defendant, a regular practicing attorney of the court, but the court may, and, for any reason which it deems good, shall appoint another attorney as a substitute for the attorney appointed by the clerk. Neither the plaintiff nor his attorney shall be appointed or be permitted to suggest the name of the defendant's attorney.

"2. Such attorney must make diligent efforts to inform the defendant by mail concerning the pendency and nature of the action against him, and must report to the court during the first term, which does not commence within sixty days after his appointment, the result of his efforts.

"3. The duties and powers of such attorney are governed by the last foregoing paragraph, unless he be employed by the defendant, or unless he be unable to inform the defendant concerning the action, or unless he learn that the defendant is under disability other than coverture, or other than infancy and coverture combined.

"4. Such attorney, if employed by the defendant, shall so report to the court, and such report shall be treated as an appearance of the defendant in the action.

"5. If such attorney can not inform the defendant concerning the action, or if he learn that the defendant is under disability other than coverture, or other than infancy and coverture combined, he shall so report to the court, and shall make an affirmative defense if he can; or if he can not make such

defense, he shall so report to the court, and shall be subject, with reference to such report, to the provisions of sub-section 3 of Section 36; and no act of his shall be treated as an appearance of such defendant.

"6. The provisions of sub-section 4 of Section 38 apply with reference to the compensation of such attorneys.

"7. No judgment shall be rendered against such defendant if under any disability other than coverture, or infancy and coverture combined, until a defense or report shall have been filed pursuant to sub-section 5 of this Section."

"Section 60. When defendant deemed constructively summoned. A defendant against whom a warning order is made and for whom an attorney has been appointed shall be deemed to have been constructively summoned on the thirtieth day thereafter, and the action may proceed accordingly."

"Section 36, sub-section 3. No judgment shall be rendered against an infant—other than a feme covert—nor against a person of unsound mind, who is summoned in this State, until the regular guardian, or committee, or guardian *ad litem*, of such defendant shall have made defense or have filed a report, stating that after a careful examination of the case he is unable to make a defense. His report, that he can not make a defense, must be filed on or before the day for making defense, unless, for cause shown, the court extend the time; and failure to file such report, as required hereby, or by the court, shall be punished as a contempt."

"Section 38, sub-section 4. The court shall allow to the guardian *ad litem* a reasonable fee for his services, to be paid by the plaintiff and taxed in the costs. The affidavit of such guardian, or of another person, or other competent evidence, is admissible to prove the services rendered, but not to prove their value. The court must decide concerning such value, without reference to the opinions of parties or other witnesses."

"In construing the provisions of this code these rules shall prevail unless a different intention be expressed or be shown by the context. Each gender includes every gender."

The above provisions are, and were at the times set forth herein, contained in an act of the General Assembly of the Commonwealth of Kentucky, entitled "An Act to regulate practice in civil causes," which was duly passed by the Legislature of Kentucky, approved by the Governor thereof, and by its terms took effect on the 1st day of January, 1877, and has, except as amended, been in force ever since, and no amendments have in any way altered the provisions above referred to.

Under divers acts of the General Assembly of the Commonwealth of Kentucky and amendments thereto, there had been, before the time of any acts complained of, established a court of general superior equity jurisdiction, entitled "The Louisville Law and Equity Court;" and under the said law the said court was held in the County of Jefferson, State of Kentucky, and had general superior equity jurisdiction of all causes brought in said county; and, among others, actions for divorce. By the terms and effect of the law creating said court, it was to have no stated terms, but to be always open for the transaction of business; and, further, by the provisions of law applicable to said court, orders of warning against absent and non-resident defendants were required to be so entered by the clerk that the said defendant should be warned to appear and answer within sixty days after the entry of such order; and was to be deemed and was constructively summoned thirty days after the entry of such order of warning.

No. 17.

Brief of Kernan & Co. for D. C.

Supreme Court U. S.
FILED
OCT 27 1899
JAMES H. McKENNEY,
Clerk.

United States Supreme Court.

Filed Oct. 27, 1899.

PETER L. ATHERTON,
Plaintiff in Error,
against
MARY G. ATHERTON,
Defendant in Error.

Brief for defendant in error.

STATEMENT.

This is a writ of error to the Supreme Court of the State of New York. It is to review a judgment entered upon the remittitur from the Court of Appeals in that State.

This action was brought by the wife, Mrs. Atherton, the defendant in error, against her husband, Mr. Atherton, the plaintiff in error, in the Supreme Court of the State of New York for a separation on the ground of cruel and inhuman treatment; and that his conduct towards her was such as rendered it unsafe and improper for her to cohabit with him; and for the care and custody of their child; and for the support of herself and their child.

Complaint, fols. 312 *to* 330.
New York Code of Civil Procedure, Sec. 1762.

Such action was commenced in January, 1893. At the time of the commencement of the action Mrs. Atherton had been for more than a year and was a citizen and resident of the State of New York, actually residing and domiciled within such State, and Mr. Atherton was a citizen and resident of the State of Kentucky. Mr. Atherton appeared in said action by his attorneys and put in his answer to the said complaint of Mrs. Atherton; a reply to some portion of such answer was put in by Mrs. Atherton.

Answer of Mr. Atherton, fols. 330 *to* 381.
Reply of Mrs. Atherton, fols. 381 *to* 384.

Said action and the issues therein were duly brought to trial and tried by the said Supreme Court without a jury at a Special Term thereof in June, 1893; after such trial, and in January, 1894, the court duly made and filed its decision and findings of fact and conclusions of law.

Findings of the Court, fols. 384 *to* 393.

Upon such findings and in accordance therewith judgment was duly and regularly entered adjudging that Mrs. Atherton was entitled to a separation from Mr. Atherton and from his bed and board; that she have the custody of their child; and that Mr. Atherton pay to her $125 per month for her support and $100 per month for the support and education of their child; and for $1,000 counsel fee and her costs and disbursements of the action.

Judgment, fols. 393 *to* 396.

Mr. Atherton filed exceptions to the findings of the court and appealed from said judgment to the General Term of the said Supreme Court.

Exceptions, fols. 396 *to* 410.
Notice of Appeal, fol. 410.

Such appeal was fully argued in the said General Term of the Supreme Court, and subsequently and in Novem-

ber, 1894, the said General Term modified the judgment so appealed from by striking therefrom the $1,000 allowed as counsel fee, and so modified, affirmed the judgment with costs to Mrs. Atherton.

Decision of General Term, fol. 428.

Judgment was duly entered in January, 1895, upon the decision of the said General Term affirming the said judgment so appealed from as modified, with costs to Mrs. Atherton.

Judgment, fol. 429.

From such judgment of affirmance Mr. Atherton appealed to the Court of Appeals. The appeal was fully argued in the Court of Appeals, and afterwards and in March, 1898, the said court rendered its judgment affirming in all things the said judgment so appealed from to said court and remitted its judgment of affirmance into the Supreme Court to be enforced therein according to law.

Remittitur, fols. 445 *to* 449.

Upon the receipt and filing of such remittitur the Supreme Court duly made and entered an order and judgment upon such remittitur making the judgment of the Court of Appeals the judgment of that court and for the costs of the said appeal to the Court of Appeals.

Order and Judgment, fols. 449 *to* 452.

To review such judgment as to the alleged errors stated in his petition, Mr. Atherton obtained the writ of error to this court.

Petition and Writ, fols. 453 *to* 462.

It was proved upon the trial and was found by the court, together with other facts, that on the 17th day of October, 1888, Mr. and Mrs. Atherton were married at Clinton, Oneida County, New York. That prior to and

at the time of such marriage Mrs. Atherton had been and was a resident of the State of New York, residing with her parents at Clinton, in the county of Oneida, in said State; and that Mr. Atherton had been and was a resident of the State of Kentucky, residing at Louisville in said State; that immediately after said marriage they went to and resided at Louisville and continued to reside there as husband and wife until in October, 1891, when she left him as hereinafter stated.

That a child of said marriage was born to them on the 8th day of January, 1890, being a daughter, named Mary V. Atherton.

That soon after the said marriage and continuing down to October 3, 1891, when Mrs. Atherton left him, Mr. Atherton was guilty of cruel and inhuman treatment to Mrs. Atherton without any just cause or reason. The court specified many acts of such treatment, and found that the acts, conduct and treatment of Mr. Atherton towards Mrs. Atherton during their married life were cruel and inhuman, and rendered it unsafe and improper for her to cohabit with him and justified her in leaving him as she did and seeking a residence separate and apart from him.

That on or about the 3d day of October, 1891, Mrs. Atherton left Mr. Atherton and the house where they resided in Louisville, taking with her their child and that she so left Mr. Atherton on account of his cruel and inhuman treatment, conduct of and towards her and for no other reason, and that she was justified in so leaving.

That after Mrs. Atherton had so left Mr. Atherton, and on or about October 10, 1891, Mr. and Mrs. Atherton and one Henry P. Goodenow entered into an agreement which was put in evidence by Mr. Atherton. This agreement will be found in the record at folios 300 to 303.

That in a few days after Mrs. Atherton had so left Mr.

Atherton she left the State of Kentucky and returned with her child to her mother at Clinton, Oneida County, New York, and that since that time she has resided with her mother at said Clinton in the State of New York and has been and is a resident of the State of New York and has not lived or cohabited with Mr. Atherton.

That when Mrs. Atherton so left Mr. Atherton and went to Clinton in the State of New York, she so left with the purpose and intention on her part not to return to the State of Kentucky, but to permanently become a resident of and reside in the State of New York; and with the intention of going to the State of New York and of changing her residence and domicile from the State of Kentucky to the State of New York, and to make her residence and domicile in the State of New York; and thereupon she became and has since been a resident of the State of New York and such state became and was and is her domicile and home.

That since Mrs. Atherton left Mr. Atherton, he has continued to reside and now resides at Louisville, Kentucky, and was and is a resident of the State of Kentucky.

That after Mrs. Atherton had so left Mr. Atherton and while she with her child were residing in the village of Clinton, in the State of New York, and in December, 1892, Mr. Atherton commenced an action in the Jefferson Circuit Court of the State of Kentucky, against Mrs. Atherton for a divorce upon the alleged ground that she had abandoned him in October, 1891, without fault on his part, and that such abandonment had continued for more than one year; that the petition in such action was not served upon Mrs. Atherton within the State of Kentucky, or at all, and she did not appear in such action in any manner; that such proceedings were had that on or about March 14, 1893, a decree was made in said action

dissolving the bonds of matrimony between Mr. and Mrs. Atherton.

That prior to and at the time of the commencement of said action and ever since, Mrs. Atherton had ceased to be a resident of the State of Kentucky, and had become and was a citizen and resident of the State of New York, domiciled and residing in the village of Clinton, in said State.

That she was not personally served with process in the said action within the State of Kentucky, or at all, nor did she in any manner appear or authorize an appearance for her in the said action, and that, therefore, the said judgment of divorce was inoperative, null and void as to her, and not binding upon her and was no bar or defense to her action in the State of New York.

Findings of the Court, fols. 384 *to* 393.

As we understand, the only question before this court under the writ of error is, as to the validity of the judgment made in Kentucky; was it valid and binding upon Mrs. Atherton; and should full faith and credit have been given to it in the State of New York?

ARGUMENT.

First.

The counsel for Mr. Atherton in their brief question the finding of fact of the trial court that Mrs. Atherton at the time of the commencement and during the pendency of the action in Kentucky was a resident of the State of New York, but remained and was a resident of the State of Kentucky, that being the residence of Mr. Atherton.

If this finding can be questioned in this court we submit that upon the evidence Mrs. Atherton had the legal right to change her residence from the State of Kentucky to the State of New York, and that she did do so and became and was a resident of the State of New York.

By reason of the cruel and inhuman treatment and conduct of and towards her by her husband as found by the court, she had the right to leave Mr. Atherton and to change her residence and domicile from the State of Kentucky to the State of New York.

A wife may acquire a residence and domicile separate and apart from that of her husband whenever it is necessary and proper for her to do so. Certainly it was eminently necessary and proper for Mrs. Atherton to leave her husband and his residence in Kentucky and go to and make her residence in the State of New York.

2 *Bishop on Marriage and Divorce, Sections* 124 *to* 128.

Cheever v. Wilson, 9 *Wallace, U. S. Rep.*, 108.

Barber v. Barber, 21 *Howard, U. S. Rep.*, 582, 593, 594.

Hunt v. Hunt, 72 *New York Reports*, 217.

Mellen v. Mellen, 10 *Abb. New Cases (New York)*, 329, *and note at the end of case.*

Shaw v. Shaw, 98 *Massachusetts Reports*, 158.

In Cheever v. Wilson, the Court, speaking on this point at page 123, says: "It is insisted that Cheever never re- "sided in Indiana; that the domicile of the husband is the "wife's and that she cannot have a different one from his. "The converse of the latter proposition is so well settled "that it would be idle to discuss it. The rule is that she "may acquire a separate domicile whenever it is necessary "or proper that she should do so. The right springs from "the necessity for its exercise and endures as long as the "necessity continues."

In Hunt v. Hunt, the Court, at page 242, says: "The "domicile of the husband is *prima facie* the domicile of the "wife. . . . . There are, however, exceptions to the "rule; one of which is invoked by the plaintiff in this "suit, so that in certain cases a married woman may have "a domicile in another jurisdiction than that of her hus- "band. This is so when they are living apart under a "judicial decree of separation, or when the conduct of the "husband has been such as to entitle the wife to an abso- "lute or limited divorce. She may acquire a separate "domicile whenever it is necessary for her to do so."

That Mrs. Atherton intended to change and did change her residence and domicile from the State of Kentucky to the State of New York and thereby ceased to be a citizen and resident of Kentucky, and became and was a citizen and resident of the State of New York from October, 1891, and that her purpose and intention to make such change was understood by Mr. Atherton at the time, as found by the court, are fully sustained by the evidence.

The agreement between them contemplated that she would seek a residence and domicile different from that of her husband. It provided that the domicile of the child was to be the State of Kentucky, but there was no such provision as to the wife. It provided for the expenses of the journey in conveying the child from the mother to the grandmother and back again, thereby showing that it was understood that the wife would have a different residence and domicile from that of her husband.

Mrs. Atherton left Kentucky and came to New York to reside with her mother in the village of Clinton. She swears that about ten days after she left her husband she left the State of Kentucky and returned to her mother at Clinton, in the State of New York; that she has lived with her, and that has been her residence ever since;

that she went to her mother's with the intention of making that her home; and that has been her home and such was her intention at the time she went there.

Evidence of Mrs. Atherton, fols. 30, 31.
Evidence of Mrs. Kelsey, fol. 96.

Mr. Atherton undoubtedly knew and understood when Mrs. Atherton left Kentucky with her sister and her aunt that she was going to her mother's home at Clinton; and he knew that she continued to live at Clinton with her mother up to and after the time he commenced his suit in Kentucky and obtained his divorce. The money payable to her by the agreement was remitted monthly to her at Clinton, as she was living at no other place during that time (fol. 250). Mr. Atherton in his answer admits that when he commenced the action in Kentucky Mrs. Atherton was at her home in Clinton (fol. 371). In the proceedings in the suit he brought against her in Kentucky she is described as a non-resident of Kentucky (fols. 262, 263, 264).

The claim is made that the reply of Mrs. Atherton is inconsistent with her having made a permanent change of residence. There is no such inconsistency. The agreement between them was made not for a separation of the parties, but to provide for the custody of the child. It provided that Mrs. Atherton would have to part with the child to the grandmother a portion of the time, and it was as to that provision of the agreement Mrs. Atherton understood it was an experiment and not to be permanent, but only to last for a year; and the reply had reference to such provision only. There was no claim and none could be made that the separation of the parties was to be temporary or experimental, or to last only a year, and the reply had no reference to any such separation.

The evidence and the attending circumstances clearly

prove that Mrs. Atherton intended to and did abandon her residence and domicile in Kentucky and came to her mother's at Clinton, in the State of New York, with the intention of making that her home; and that she has since resided there and made it her home; and that she became and was, from the time of going to Clinton, a citizen and resident of the State of New York, actually domiciled and residing in such State. The question was one of fact to be decided upon all the evidence and circumstances and was correctly decided.

DePuy v. Wurtz, 53 *New York Reports*, 556.
DeMeli v. DeMeli, 120 *New York Reports*, 486.
Phelps v. The N. Y. &c. Railroad Company, 17 *App. Div. R.* (*New York*), 392, 395.

It was competent and proper to prove that Mrs. Atherton was justified in leaving Mr. Atherton and the State of Kentucky, and going to the State of New York and making her home in that State; and that she became and was a citizen and resident of that State prior to and during the pendency of the action in Kentucky. Neither the constitutional provision that full faith and credit shall be given in each State to the judicial proceedings of every other State, nor the act of Congress passed in pursuance thereof, prevents an inquiry into the jurisdiction of the Court by which a judgment offered in evidence was rendered. Want of jurisdiction may be shown either as to the subject matter or the person.

Boswell v. Otis, 9 *How. U. S. R.*, 336, 348.
Thompson v. Whitman, 18 *Wallace, U. S. R.*, 457.
Cole v. Cunningham, 133 *U. S. R.*, 107, 112.
Jones v. Jones, 108 *New York*, 415, 423.
Williams v. Williams, 130 *New York*, 193.

Second.

The judgment of divorce in Kentucky in favor of Mr. Atherton was no bar or defense to the action of Mrs. Atherton in the State of New York. Prior to and at the time of the commencement of the action in Kentucky and at the time the judgment was obtained in such action, Mrs. Atherton was not a citizen or resident of Kentucky and was not domiciled or residing in such State. She was a citizen and resident of the State of New York, actually domiciled and residing in such State. No process in the Kentucky action was personally served upon her in the State of Kentucky or at all, and she made no appearance in such action. The judgment, therefore, as to her was inoperative and void and did not bind her, and was no defense to her action in the State of New York.

So far as we have been able to discover it has never been held by this court that a judgment so obtained was valid or operative or binding upon the defendant therein who was a non-resident of the State in which the judgment was obtained and a citizen and resident of another State. This court has uniformly held that the only judgments obtained in the State courts which were valid and operative and binding upon non-residents, who were citizens and residents of other States, were judgments rendered in actions *in rem*, when property of the defendant was actually in the State where the actions were brought and substituted service of process was made upon the defendant; and in actions *in personam*, where the process in the action was personally served on the defendant in the State where the action was brought, or he voluntarily appeared in such action.

The personal service of process upon the defendant required must be made upon him personally within the

State where the action is brought. Personal service outside of such State is not sufficient.

Pennoyer v. Neff, 95 *U. S. R.*, 714.

An action was brought in Ohio to compel the specific execution of a contract relating to land where the defendants were non-residents of the State, and publication of process was made, the court gave a money decree and ordered the sale of other lands than those mentioned in the bill. The decree was held void. The court said: "Jurisdiction is acquired in one of two modes: First, "as against the person of the defendant by the service of "process; or, secondly, by a procedure against the property of the defendant within the jurisdiction of the "court. In the latter case the defendant is not personally bound by the judgment beyond the property in "question; and it is immaterial whether the proceeding "against the property be by an attachment or bill in "chancery. It must be substantially a proceeding *in* "*rem*."

Boswell's lessee v. Otis, 9 *How. U. S. R.*, 348.

An action of debt was brought in New York on a judgment recovered in Massachusetts. It appeared that the defendant in the judgment at the time the same was obtained was a citizen and resident of New York, and that the action was commenced by attachment which was served by attaching some furniture which belonged to the defendant, accompanied with a summons served on the wife of the defendant. The plaintiff was non-suited on the ground that the judgment was not binding upon the defendant. The non-suit was sustained by the court. The court at page 40 says: "The non-suit was properly directed. The defendant was not a resident of "Massachusetts when the suit was commenced. His "domicile was in this State and being in person here and

"not within the jurisdiction of the Court of Massachu-
"setts, he was not and could not have been served with
"process. The attachment of an article of his property
"could not bind him; it cou'd only bind the goods at-
"tached as a proceeding *in rem*., and the judgment ob-
"tained by default in pursuance of such an attachment
"can not be the ground here of an action against the de-
"fendant. To bind a defendant personally by a judg-
"ment when he was never personally summoned or had
"notice of the proceeding would be contrary to the first
"principles of justice." The court cites a number of cases in this and other courts.

Kilburn v. Woodworth, 5 *Johnson* (*New York*) *Reports*, 37, *cited with approval in* 95 *U. S.*, 732.

A judgment was obtained in New York against two partners, one of whom resided in Louisiana and was never served with process. An action upon the judgment was brought against such defendant in Louisiana. It was held that the action could not be maintained; and that Congress did not intend, by the act of 1890, to declare that a judgment rendered in one State against the person of a citizen of another who had not been served with process or voluntarily made defense, shall have such faith and credit in every other State as it had in the courts of the State in which it was rendered.

D'Arcy v. Ketchum, 11 *How. U. S. R.*, 165.

A judgment recovered in the Common Pleas at Westminster, England, against a person in the United States, without any service of process on him, or any notice of the suit other than a personal one served on him in this country, has no validity here; it is simply null.

Bischoff v. Wethered, 9 *Wallace U. S. R.*, 812.

An action commenced by attachment and where substituted service was made, was brought in Tennessee and by a writ of error was brought to this court. In discussing the jurisdiction of the court, the court at pages 316, 317, 318, says: "Jurisdiction of the person is obtained "by the service of process or by the voluntary appear- "ance of the party in the progress of the cause. Juris- "diction of the *res.* is obtained by a seizure under process "of the court, whereby it is held to abide such order as "the court may make concerning it. . . . . If "the defendant appears the cause becomes mainly a suit "*in personam*, with the added incident that the property "attached remains liable under the control of the court, "to answer to any demand which may be established "against the defendant by the final judgment of the "court. But, if there is no appearance of the defendant "and no service of process on him, the case becomes, in "its essential nature, a proceeding *in rem.*, the only effect "of which is to subject the property attached to the pay- "ment of the demand which the court may find to be due "to the plaintiff."

Cooper v. Reynolds, 10 *Wallace U. S. R.*, 308, *cited with approval in Cole v. Cunningham*, 133 *U. S. R*, 107, 116.

A personal judgment is without any validity if it be rendered by a State court in an action upon a money demand against a non-resident of the State who was served by publication of the summons, but upon whom no personal service of process within the State was made, and who did not appear.

The State having within her territory property of a non-resident, may hold and appropriate it to satisfy the claims of her citizens against him, and her courts may adjudicate in reference to the same.

Pennoyer v. Neff, 95 *U. S. R.*, 714.

The court says at page 723: "It is in virtue of the "State's jurisdiction over the property of a non-resident "situated within its limits that its tribunals can inquire "into that non-resident's obligations to its own citizens, "and the inquiry can then be carried only to the extent "necessary to control the disposition of the property. If "the non resident have no property in the State there is "nothing upon which the tribunals can adjudicate."

Again, at page 727, speaking of substituted service, the court says: "Such service may answer in all actions "which are substantially proceedings *in rem*. But where "the entire object of the action is to determine the per- "sonal rights and obligations of the defendants, that is, "where the suit is merely *in personam*, constructive "service in this form upon a non-resident is ineffectual "for any purpose. Process from the tribunals of one "State cannot run into another State and summon parties "there domiciled to leave its territory and respond to "proceedings against them. Publication of process or "notice within the State where the tribunal sits cannot "create any greater obligation upon the non-resident to "appear. Process sent to him out of the State, and pro- "cess published within it, are equally unvailing in pro- "ceedings to establish his personal liability."

After having cited a number of cases, both in this court and in State courts, the court says, at page 730: "In "all the cases brought in the State and Federal courts "where attempts have been made under the acts of Con- "gress to give effect in one State to personal judgments "rendered in another State, against non-residents without "service upon them, or upon substituted service by "publication, or in some other form, it has been held "without an exception, so far as we are aware, that such "judgments were without any binding force except as to "property, or interests in property, within the State, to "reach and affect which was the object of the action

"in which the judgment was rendered, and which prop-
"erty was brought under control of the court in connec-
"tion with the process against the person. The proceed-
"ing in such cases, though in the form of a personal ac-
"tion, has been uniformly treated, where service was not
"obtained, and the party did not voluntarily appear, as
"effectual and binding merely as a proceeding *in rem.*,
"and as having no operation beyond the disposition of
"the property, or some interest therein."

The judgment of a court of a sister State recovered upon trustee process, or attachment proceedings, in which the defendant is not personally served with process, and does not appear, is effectual only to bind such property of the debtor as is found within the jurisdiction.

Ward v. Boyce, 152 *New York Reports*, 191,
and cases cited in this and other courts.

The court at page 196, says: "If the proceedings
"involve the determination of the personal liability of
"the defendant, he must be brought within the jurisdic-
"tion, by service of process within the State or voluntary
"appearance. If it be a proceeding *in rem*, the *res* must
"have been seized or attached, or at least must be within
"the jurisdiction."

The foregoing are a few of the cases in this court, and there are many of like character in the courts of some of the States, and they clearly show that the rule has been well established and adhered to that the only judgments in the State courts procured upon substituted service held to be valid and binding upon non-resident defendants, citizens and residents of other states, were judgments obtained in actions *in rem.* where property of the defendants was within the State in which the actions were

brought, and seized by the process of the court, to be held to satisfy the judgments when obtained. In other actions, actions *in personam*, the rule has been equally well established that judgments in State courts against non-residents, citizens and residents of other States, were not valid or binding upon the defendants unless process was personally served upon them within the State in which the actions were brought or they voluntarily appeared in such actions.

This court is now asked to depart from this rule, and make exception to the same, in actions for divorce, where one of the parties to the marriage contract brings an action in the State court of his or her residence against the other party who is a non-resident of such State in which the action is brought and a citizen and resident of another State, and to hold that judgments recovered in such actions, upon substituted service of process, and where the defendant was not personally served with process within the State where the action was brought and made no appearance in such action, are valid and binding upon the defendants in such actions in the States in which they are citizens and residents. This is asked upon the ground that actions for divorce are actions *in rem*, and therefore substituted service of process is sufficient to give the court jurisdiction of the defendants.

We submit that actions for divorce are not actions *in rem*, and do not come within the cases of that character decided by this Court. There is no *res*, no tangible property or thing within the State where such actions are brought which can be seized by the process of the Court, and which alone, with substituted service of process, gives jurisdiction to the Court in the actions. There is nothing to be adjudicated upon but the marriage contract, and this cannot make the actions *in rem*. Such actions are

actions *in personam*. They have reference to and affect the personal relations and obligations of the parties thereto, one to the other, the personal rights of property, of support, especially to the wife, of the personal character and position of the parties in society; in their objects and in their effects they are actions above all others *in personam* and should be treated as such.

The idea that the marital relation is a *status*, and that such *status* is a *res*, and that therefore, an action for divorce is an action *in rem*, and that the judgment of a State Court in such an action obtained by one party, a resident of such State, against the other party, a citizen and resident of another State, upon substituted service of process alone, is valid and dissolves the marriage contract between the parties, is of comparatively recent origin and was first put forth, we believe, by Bishop in his work upon marriage and divorce. It is evident from his work that Bishop was strongly in favor of the idea, and his conclusion that it should be adopted was more his own opinion than founded upon authority.

In speaking of this idea put forth by Bishop, that marriage creates a relation which is a *status*, and that this *status* is entitled to be treated as a *res*, in *McCreary v. Davis*, 44 *So. Carolina Reports*, *page* 207, the Court says: "Now this author admits that Bigelow, J., in *Lit-*
"*tle v. Little*, 13 *Gray*, 264, correctly stated that all author-
"ities concur in the conclusion that marriage has its origin
"and foundation in a purely civil contract. This is an,
"or rather, *the* initial point. How do these authors reach
"the conclusion which Dr. Bishop announces, and though
"the new relation, that is the *status*, retain some simili-
"tudes reminding us of its origin the contract does in
"truth no longer exist, but the parties are governed by
"the law of husband and wife. Is it not an assumption

"coined in order to give a plausible basis to the solution "of an otherwise untenable position? Is it not by this "means that they hope to give currency to an otherwise "baffled policy, namely: to so construct a plan that there- "by they may successfully invoke that portion of the "Federal constitution relating to the effect to be given by "all the States to the acts and judgments of one State, and "thus force all other States to give effect to judgments for "absolute divorces? If marriage were still esteemed a "civil contract, they could not hope to escape the defect "of jurisdiction hereafter to be discussed. But by coin- "ing this new term '*status*' and ascribing the efficacy of "'*res*' to it under certain principles hereafter to be refer- "red to, it is deemed by them, that the difficulty has been "overcome. We will investigate these later matters here- "after. Just now we are interested in this discovery "made by Dr. Bishop in the year 1852, which seems to "have become very popular with all those persons who "favor divorce laws."

The rule contended for, that judgments in actions for divorce in the State courts by one party, a resident of such State against the other party, a non-resident of such State, and a citizen and resident of another State, and upon whom substituted service of process only has been made, has not been established in this country by the decision of this court, as we understand. And while it has been adopted in some of our States, in others it has been totally repudiated. The rule has not been adopted in England or Scotland as to judgments of divorce in foreign countries obtained in such manner.

Brown on Jurisdiction, Sec. 77.

The rule is well settled in the State of New York by the decisions of its courts from an early date, and also in

some of the other States, by the decisions of their courts, that any judgment of divorce rendered in an action in one State in favor of a resident of such State against a non-resident of such State, and a resident and citizen of another State, upon substituted service of process and where there was no personal service of process upon the defendant within the State where the action was brought, and where the defendant did not appear in such action, was and is void and inoperative and of no force or effect against the defendant. That if such action be considered in the nature of an action *in rem.*, so far as it affects the marital *status*, the judgment can only affect the *status* of the party bringing the action in the State in which the judgment was rendered. That the judgment can have no extra territorial force or effect. That it cannot and does not affect the marital *status*, the rights or privileges of the other party, a citizen and resident of another State, and as to such party it is inoperative and void.

The following are some of the cases decided by the courts of the State of New York:

Borden v. Fitch, 15 *John. Reports*, 121.
Bradshaw v. Heath, 13 *Wend. R.*, 407.
Visher v. Visher, 12 *Barb. R.*, 640.
Kerr v. Kerr, 41 *N. Y.*, 272.
Hoffman v. Hoffman, 46 *N. Y.*, 30.
Hunt v. Hunt, 72 *N. Y.*, 217.
People v. Baker, 76 *N. Y.*, 78.
O'Dea v. O'Dea, 101 *N. Y.*, 23.
Jones v. Jones, 108 *N. Y.*, 415.
Cross v. Cross, 108 *N. Y.*, 628.
DeMeli v. DeMeli, 120 *N. Y.*, 485.
DeGarome v. Johnson, 86 *Hun*, 390.
Rigney v. Rigney, 127 *N. Y.*, 408.
Williams v. Williams, 130 *N. Y.*, 193.
People v. Karlsioe, 1 *App. Div. R.*, 571.
Bell v. Bell, 4 *App. Div. R.*, 527.

The question in 15 *Johnson*, 121, was as to the validity of a judgment of divorce obtained in Vermont against the wife who was a resident of Connecticut, and who had never been in the State of Vermont, and upon whom no personal service of process in the action had been made and who had not appeared therein. The judgment was held void. The court, at page 140, says: "To sanction "and give validity and effect to such a divorce appears to "me to be contrary to the first principles of justice. To "give any binding effect to a judgment, it is essential "that the court should have jurisdiction of the person "and of the subject matter; and the want of jurisdiction is "a matter that may always be set up against a judgment "when sought to be enforced or where any benefit is "claimed under it. The want of jurisdiction makes it "utterly void and unavailable for any purpose. The "cases in the English courts and in those of our sister "States as well as in this court are very strong to show "that judicial proceedings against a person not served "with process to appear and not being within the juris-"diction of the court, and not appearing in person or by "attorney, are null and void."

The Court then cites and comments upon several cases, and says at page 142: "It is said by the Court that to "bind a defendant personally by a judgment when he was "never personally summoned nor had notice of the pro-"ceedings, would be contrary to the first principles of "justice; and that whether the proceedings were valid "and according to the course of the Court in the place "where such judgment was obtained or not, would make "no difference. It must then be taken, I think, as a set-"tled law of this State, that a judgment obtained in a "sister State against a person not being within the juris-"diction of the Court, nor having been served with pro-"cess to appear, nor having appeared to defend the suit, "will be absolutely void. This principle must apply "equally to a divorce as to any other judgment. These

" are principles, too, that have been recognized and sanc-
" tioned in the State Courts under the Constitution and
" law of the United States as now existing."

The question in 12 *Barb.* 640, was as to the validity of a judgment of divorce obtained in Michigan against the wife upon publication of process in a newspaper, and which judgment was regular and valid under the laws of Michigan. No process was personally served upon the wife nor did she appear in the action. The judgment was held void. The Court cites a great many cases decided in this country and in England in support of its decision. In holding the divorce invalid, at page 647, the Court says: " It is a sound principle of law as well as of natu-
" ral justice, that no person should be bound by a judg-
" ment without an opportunity to be heard."

The question in 41 *N. Y.*, 272 was as to the validity of a judgment of divorce against the wife granted in Indiana, where neither of the parties in fact resided at the time, and where there was no personal service of process upon her within that State, nor authorized appearance for her. The judgment was held void upon the ground that there was no personal service of process upon the wife within the State of Indiana and no appearance by her in the action and therefore, the court acquired no jurisdiction of her. It was not held invalid upon the ground, as stated by the counsel for the plaintiff in error in their brief, that at the time the husband brought the suit he was not a citizen of Indiana, but was a citizen and resident of the State of New York, as clearly appears in the opinion of Mr. Justice Grover.

The question in 46 *N. Y.*, 30, was as to the validity of a decree of divorce obtained by the husband in Indiana. It appeared at the time of commencing the suit and while

it was pending, that both parties resided in New York. No process was personally served upon the wife and she did not appear in the action. The decree was held invalid. The statute of Indiana required notice of the petition to be published in some weekly paper published in the county. The court says at page 33: "The "State might as well have enacted that a divorce might "there be procured by *bona fide* residence without any no- "tice whatever to a non-resident upon proof of the re- "quired facts. Honest justice would be thus quite as "well attained."

And at page 34, the court says: "The necessary "effect of sustaining this decree would be to allow any "other State substantially to make laws for this State; to "regulate not only our domestic relations of husband and "wife, but almost every other right. A court "has no more authority to assume jurisdiction "over a marriage contract than over any other "subject without due service of process or the "appearance of the party defendant. . . . . For "the reason, therefore, that the Court in Indiana had no "jurisdiction of the subject of the action as the plaintiff "in that action was in fact, a resident of this State at the "time he claimed to have resided there, and went to In- "diana only to obtain this decree; and the defendant "therein was during all the time a resident of this State, "was never served with process or appeared in that "action, the decree therein cannot be enforced here, but "must be held void. This decision may operate harshly "upon innocent parties, but it cannot affect the rule "of law."

As to this case, the counsel for the plaintiff in error are mistaken in stating in their brief that it was held that the decree was not valid because it appears that at the time it was obtained in Indiana, both husband and wife resided in the State of New York. It clearly appears from the

opinion of the Court that the divorce would have been held void if the husband had been a resident of Indiana at the time of the commencement of and during the pendency of the action. The decision was based upon both grounds.

The question in 72 *N. Y.*, 217, was as to the validity of a decree of divorce obtained by the husband in Louisiana. It appeared that the husband and wife at the time of their marriage were citizens and residents of the State of Louisiana, and that they continued to reside there for some time, when the wife left the home of her husband and the State of Louisiana and did not return. It did not appear, nor was there any finding, that she had cause in the conduct of her husband for leaving him, or for an absolute or limited divorce. The husband continued a citizen and resident of Louisiana and obtained there the decree of divorce while the wife was absent from the State, and upon substituted service of process. The decree was held valid on the ground that the domicile of the wife was the domicile of the husband, and that therefore, she having no good cause for leaving him, her domicile was his domicile and that being in the State of Louisiana, she was subject to the laws of such State, and that substituted service of process authorized by the laws of such State gave the Court jurisdiction of her person in the action, the same as though the process had been personally served upon her in that State, or she had appeared in the action.

If, in that case, it had been shown and found, as it was shown and found in the case now before the Court, that the wife was driven from her husband by his cruel and inhuman treatment of and conduct towards her, and that she left him and the State where they resided and became a citizen and resident of another State, and that she was

justified in so doing, the Court would have held the decree, obtained as it was upon substituted service, void as to the wife in this State, as it had before and has since held.

In 76 *N. Y.*, 78, the question was as to the validity of a divorce procured by the husband in the State of Ohio against the wife, a citizen and resident of another State upon service of process upon the wife by publication. The decree was regular under the laws of the State of Ohio. It was held void as to the wife in another State. The Court at page 84, speaking in reference to the case of *Pennoyer v. Neff*, 95 *U. S.*, 714, and to that portion of the decision cited by counsel for the plaintiff in error in their brief, says: "The dictum in the case of "95 U. S., 714, even had it the force of a judgment does "not go to the extent needed, to overrule these decisions in "our State. It is there held that to warrant a judgment "*in personam* there must be personal service of process, or "assent in advance to a service otherwise. It is also "said that a State may authorize judicial proceedings to "determine the *status* of one of its own citizens towards "a non resident, which will be binding within the State, "though had without personal service of process or ap-"pearance. It is not said, much less is it authoritatively "decided, that a judgment thus got may do more than "establish the *status* of the parties to it, within the State "in which the judgment is rendered. The case just cited "is the latest annunciation known to us of the Supreme "Court of the United States. It does not overrule the "declarations of our own courts. It rather sustains them. "We must and do concede, that a State may adjudge the "*status* of its citizen towards a non-resident; and may "authorize to that end such judicial proceedings as it sees "fit; and that other States must acquiesce, so long as the "operation of the judgment is kept within its own con-"fines. But that judgment cannot push its effect over

"the borders of another State, to the subversion of its "laws and the defeat of its policy; nor seek across its "bounds the person of one of its citizens, and fix upon "him a *status* against his will and without his consent, "and in hostility to the laws of the sovereignty of his "allegiance.

"It is said, that a judicial proceeding to touch the "matrimonial relation of a citizen of a State, whether "the other party to that relation is or is not also a citi- "zen, is a proceeding *in rem*, or, as it is more gingerly "put, *quasi in rem*. But it was never heard that the "courts of one State can affect in another State the *rem* "there, not subjected to their process, and over the per- "son of the owner of which no jurisdiction has been got. "Now, if the matrimonial relation of the one party is the "*res* in one State, is not the matrimonial relation of the "other party a *res* in another State? And, hence, "if one party to a proceeding is domiciled in a State, the "*status* of that party, as affected by the matrimonial re- "lation, may be adjudged upon and confirmed or changed "in accordance with the laws of that State. But has not "the State in which the other party named in the "proceedings is domiciled, also the equal right to de- "termine his *status*, as thus affected, and to declare by "law what may change it, and what shall not change it? "If one State may have its policy and enforce it on the "subject of marriage and divorce, another may. And "which shall have its policy prevail within its own bor- "ders, or shall yield to that of another, is not to be de- "termined by the facility of the judicial proceedings of "either, or the greater speed in appealing to them. . .

"Whatever we may hold in the United States it will "not change results in foreign countries. And in seek- "ing for a rule which shall be of itself, from its own "reason, correct, we ought to find or form one, if may be, "that is generally applicable. However submissively we

"must concede to every sovereignty the right to maintain "such degree of strictness in domestic relations as it sees "fit, within its own territory, there is no principle of "comity which demands that another sovereignty shall "permit the *status* of its citizens to be affected thereby, "when contrary to its own public policy, or its standard "of public morals."

In 108 *N. Y.*, 415, the question was as to the validity of the decree of divorce obtained in the State of Texas by the wife against the husband. Substituted service of process was made on the husband in New York. Thereafter, he being in Texas filed his answer in the action and the action was tried and the decree granted. It was held that while the Texas court acquired no jurisdiction by the service of process in New York yet, that by going to Texas and filing his answer the court acquired jurisdiction, and therefore the decree was valid and binding upon the husband. At page 423, the Court says: "It is an elementary principle that no court "can lawfully adjudge rights of persons or property in "the absence of jurisdiction; and it is firmly settled that "a judgment of the court of another State is binding here "only so far as the court rendering it had jurisdiction. "It is not protected under the constitution and laws of "the United States from attack for want of jurisdiction. "If rendered without jurisdiction, it is not a judgment, "but a mere arbitrary prescription, without force as a ju- "dicial proceeding in another forum."

Again, at page 424, the Court says: "The marriage "relation is not a *res* within the State of the party in- "voking the jurisdiction of a court to dissolve it, so as to "authorize the Court to bind the absent party, a citizen of "another jurisdiction, by substituted service or actual no- "tice of the proceeding given without the jurisdiction of "the court where the proceeding is pending."

In 120 *N. Y.*, 485, the question was as to the validity of a decree of divorce obtained in Germany by the husband against the wife who was in New York, and upon whom substituted service of process was made. It was assumed the decree was obtained according to the law of Germany. It was held void as to the wife.

At page 495 the court says: "The Court has no extra "territorial jurisdiction and a person not domiciled in the "State or country cannot be charged *in personam* by ad- "judication there, unless he is personally served with "notice or process within it, or voluntarily submits him- "self to the jurisdiction of its court by appearing in some "manner in the action or proceeding sought to be insti- "tuted against him." Several cases in this court and in State courts are cited in support of such doctrine.

In 127 *N. Y.*, 408, the question was as to the validity of a decree of divorce obtained in New Jersey by the wife against the husband. The husband abandoned his wife in New Jersey and became a resident of New York. His wife continued to reside in New Jersey and brought an action for a divorce there. The husband appeared and filed an answer denying the allegations in the complaint. The issue so joined was never tried. The wife thereafter verified a supplemental complaint alleging acts of adultery after the commencement of the action. An order for service of this by publication was made and certified copies of the supplemental complaint and order were served upon the husband in New York. He made no further appearance, and upon his default, proofs being made of the allegations in the supplemental complaint, the decree was granted. The action in New York was brought by the wife to enforce this decree as to alimony and costs. It was held that the portion of the decree in question was void upon the ground that service of the supplemental complaint upon the husband in New York did not give the court jurisdiction. The court, at page

413, says: "The courts of the United States and those "of most of the several States, including New York and "New Jersey, hold a divorce to be valid as far as it "affects the marital status of the plaintiff which is grant-"ed by the courts of a State pursuant to its statutes to "one of its resident citizens in an action brought by such "citizen against a resident citizen of another State, though "the defendant neither appears in the action nor is served "with process in the State wherein the divorce is grant-"ed. (Several authorities cited.) But the courts of "this and some of the States hold that the marital status "of such non-resident defendant is not changed by a "judgment so recovered, he or she remaining a married "person." (Several authorities cited.)

This case was taken to this court and is reported in 160 *U. S.*, 531. This court held that the New York courts in dismissing the plaintiff's complaint did not give due effect to the provisions of the constitution of the United States, which require that full faith and credit shall be given in each State to the judicial proceedings of every other State. It so held, as we understand, upon the ground that the appearance of the husband in the action in New Jersey gave to the court jurisdiction of his person in that action, and that therefore, he was personally bound by the judgment, not only in New Jersey, but in the State of New York.

At page 539, the Court says: "But the defendant seeks "to avail himself of the well settled doctrine that it is "competent for a defendant when sued in the court of "his domicile on a judgment obtained against him in "another State, to show that the court of such other State "had not jurisdiction to render the judgment against him. "To sustain this position in this court, the defendant re-"lies upon the sixth finding of the trial court, which was as "follows: 'That the above named defendant was never "'served with process in New Jersey under said supple-

" 'mental bill. And never appeared therein or answered
" 'thereto, and the decree of the Court of Chancery of
" 'New Jersey, which was based entirely upon
" 'charges of adultery, contained in said supplemental
" 'bill, did not, under the laws of that State, become
" 'binding upon said defendant personally.'

"It is undoubtedly true, as claimed by the defendant "in error, that if the judgment of the Court of Chancery "of New Jersey was not binding upon the defendant "therein personally in that State, no such force could be "given to it in the State of New York."

The following are some of the decisions of the courts of some of the other States to the same effect:

Barber v. Root, 10 *Mass.*, 260.
Lyon v. Lyon, 2 *Gray*, (*Mass.*) 367, 368.
Prosser v. Warner, 47 *Vermont*, 667.
Doughty v. Doughty, 28 *New Jersey Eq.*, 581.
Flower v. Flower, 42 *New Jersey Eq.*, 152.
McGuire v. McGuire, 7 *Dana* (*Ky.*) 181.
Irby v. Wilson, 1 *Dev. & Battle*, (*No. Car.*) 568.
Cited in Arrington v. Arrington, 102, (*No. Car.*) 502, 512.
McCreary v. Davis, 44 *So. Car.*, 195.
Beard v. Beard, 21 *Indiana*, 321.
Cook v. Cook, 56 *Wisconsin*, 195.
Wright v. Wright, 24 *Michigan*, 180.
Garner v. Garner, 56 *Md.*, 128.
Coxe v. Coxe, 19 *Ohio State*, 502.

In 10 *Mass.*, 260, the question was as to a divorce obtained by the wife against the husband in the State of Vermont where they were then living. Effect was given to the divorce. In speaking of the laws of Vermont authorizing suits for divorce against non-residents the Court, at page 265, says: "The laws of Vermont which authorize

"the Supreme Court of that State to proceed in suits for "divorce instituted in favor of persons resident for a time, "but having no settled domicile within the State, against "persons resident and domiciled in other States, who are "not and never have been amenable to the sovereignty of "the State of Vermont, upon allegations of offences not "pretended to have been committed within the territory "of the State or contrary to the peace, morals or economy of "the society there, or in violation of any contract subsist- "ing, or which has ever been recognized there,—in short "where no jurisdiction of the parties or of the subject "matter can be suggested or supposed,—are not to be "justified by any principles of comity which have been "known to prevail in the intercourse of civilized States. "I must be permitted to say the operation of this as- "sumed and extraordinary jurisdiction is an annoyance "to the neighboring States, injurious to the morals and "habits of their people: and the exercise of it is for "these reasons, to be reprobated in the strongest terms, "and to be counteracted by legislative provisions in the "offended States."

This case was decided before the statute was passed in Massachusetts which is cited in the brief for the plaintiff in error, which declares such divorces of no force or effect in that State.

In 47 *Vermont*, 667, the question was as to the validity of a divorce obtained by the wife against the husband in the State of New York upon substituted service. It was held that the court acquired no jurisdiction of the person of the husband and that the decree for alimony rendered by it upon granting a divorce was not binding upon him in Vermont. The court says at pages 672, 673: "The "acts relied upon for the cause of divorce must have ac- "crued while the parties were subject to the law of the "forum where the divorce is granted; otherwise the courts

"in one jurisdiction might determine and administer the "marriage relation between citizens domiciled in another "jurisdiction. This would allow one jurisdiction to pass "laws in the language of Lord Ellenborough, in *Buchanan* "*v. Rucker*, 9 *East.*, 192, 'to bind the rights of the whole "'world.' The proposition is too absurd to require refu- "tation. In much the larger number of adjudged cases "and, as we think, of the better considered cases, it has "been held that the judgment rendered in a suit for "divorce in a State where the cause of action did not "accrue, and where the parties were not then living as "husband and wife, and where the defendant in the pro- "ceeding never was served with process nor voluntarily "submitted to the jurisdiction of the court, is wholly void "in any other jurisdiction than the one in which it was "rendered." (Citing a number of cases.) "The courts "of New York have gone quite as far as those in other "States in holding such judgments void. . . . . "The contrary doctrine has been maintained in *Harding* "*v. Allen*, 9 *Greenl.*, 140, *Ditson v. Ditson*, 4 *R. I.*, 89, "and *Tolen v. Tolen*, 2 *Black*, (*Ind.*,) 407. In *Ditson v.* "*Ditson* the vality of *ex parte* divorces in foreign States is "attempted to be upheld on the principle that jurisdiction "of the *cause* is acquired by the domicile of one of the "parties, notwithstanding the cause accrued without the "State, upon the ground that it pertains to all sovereign "States to declare conclusively a status of their own citi- "zens. But the soundness of these decisions is strongly "questioned both upon principle and authority by the "late Chief Justice Redfield in an article in 3 *Am. Law* "*Reg. N. S*, 193, in which he thoroughly reviews the "whole subject. He admits that such judgments may be "a protection to the parties obtaining them in the juris- "diction where they are obtained; but denies that they "have any validity in foreign jurisdictions. And such, "we think, is the better doctrine. Otherwise in de- "termining the status of its own citizens such sovereign

"State, necessarily conclusively determines the status of "the citizen of another sovereign State whenever the "other party to the marriage relation is domiciled in a "foreign jurisdiction."

In 28 *New Jersey Equity*, 581, it was held that a decree of divorce will have no extra territorial effect when the defendant is domiciled in another State and is not served with process nor with notice of the proceedings.

At page 585 the court by its Chief Justice says: "In "the present case it is claimed that the judgment in the "court of Illinois had the effect not only of changing the "status of the appellant in that State and thus, in that "respect enforcing the policy of the laws of that locality, "but the future effect of changing the status of the re- "spondent in this State, her citizenship here being undis- "puted. The right of the foreign court to adjudicate "with respect to the status of its own domiciled citizen is "undisputed; but I fail to see how its right to decide the "status of a citizen of this State, by such adjudication, is "to be conceded. It seems to me that a judgment can "carry with it *per se* no extra territorial force when the "jurisdiction in the case rests alone on the fact that the "complainant has his domicile within such jurisdiction. "All the claim which such an adjudication has to for- "eign recognition, in my opinion, rests on the ground of "comity. It is not a judgment such as is entitled to "recognition and enforcement in other States by force of "the act of Congress and the constitution of the United "States. In my opinion it is only judgments that ensue "from jurisdiction regularly obtained over the parties by "service of process upon them, or by voluntary appear- "ance, or when the proceeding is strictly *in rem.*, that "carry with them these high sanctions and which there- "fore, are everywhere conclusive. Jurisdiction in di- "vorce suits arising out of the status and domicile of one of

"the parties, cannot impart to a judgment any such ef-
"ficiency."

In reference to this class of divorces obtained by a resident of a State against a resident of another State, Story, in his work on Conflict of Laws, says: "There is still one "further descent against which almost all civilized States "have hitherto protested, but which, to the great discredit "of the American character and name, some of the Amer-"ican States seem disposed to yield: that of giving effect "to merely *ex parte* decrees of divorce, granted upon the "petition of one of the parties, domiciled temporarily or "permanently in a State foreign to that where the alleged "cause of the divorce occurred, and where both parties "were at the time domiciled, and where the other party "still resides and is domiciled, unless that domicile can "be transferred, *in invitum*, after the separation of the "parties. But we are happy to believe that this painful "disregard of the most vital principles of international "jurisprudence. has not been adopted or countenanced in "those States whose decisions are most regarded as author-"ity, both at home and abroad."

Story on Conflict of Laws, 7th Ed., Sec. 230 d., and cases cited in note.

The judgment of divorce obtained in Kentucky by Mr. Atherton against Mrs. Atherton is inoperative and void, and of no force or effect as to her, for another reason. It was obtained in violation of the provision of the constitution of the United States, which provides, that no person shall be deprived of property without due process of law. Due process of law required personal service of process upon Mrs. Atherton in Kentucky or her appearance in the action.

Ward v. Boyce, 152 *N. Y.*, 191.
Pennoyer v. Neff, 95 *U. S.*, 714, 733.

In 152 *N. Y., page* 195, the court says: "A party "cannot be deprived of property without due process of "law, and that term in its application to judicial proceed- "ings means a course of legal proceedings according to "those rules and principles which have been established "by our jurisprudence for the protection and enforce- "ment of private rights. If the proceedings involve the "determination of the personal liability of the defendant, "he must be brought within the jurisdiction, by service "of process within the State, or voluntary appearance. "If it be a proceeding *in rem* the *res* must have been "seized or attached, or at least must be within the juris- "diction." (Several authorities cited.)

In 95 *U. S., page* 733, the court, speaking of judicial proceedings within this provision of the Constitution, says: "They then mean a course of legal proceedings, "according to those rules and principles which have been "established in our systems of jurisprudence for the pro- "tection and enforcement of private rights. To give "such proceedings any validity there must be a tribunal "competent by its constitution—that is, by the law of its "creation—to pass upon the subject matter of the suit; "and if that involves merely a determination of the per- "sonal liability of the defendant, he must be brought "within its jurisdiction by service of process within the "State, or his voluntary appearance."

Third.

The provisions in the New York judgment for alimony and for the custody and maintenance of the child, were legal and proper.

New York Code of Civil Procedure, Sections 1762, 1766.

Matter of Waldron, 13 *Johnson*, (*N. Y.*) 418.
Mercein v. People, 25 *Wend.*, (*N. Y.*) 64, 106.
Matter of Welch, 74 *N. Y.*, 299.
Allen v. Allen, 105 *N. Y.*, 628.
People v. Walts, 122 *N. Y.*, 238.

The agreement between Mr. and Mrs. Atherton did not prevent such provisions. It was not binding upon the Court so as to take from it the power to provide for the custody of the child and for its best interests and welfare.

People v. Mercein, 3 *Hill*, (*N. Y.*) 400, 411.
Bush v. Brown, 35 *Hun*, (*N. Y.*) 324.
Allen v. Alfick, 64 *How.*, (*N. Y.*) 380.

Mr. Atherton cannot complain that the terms of the agreement were not carried into the judgment in New York. He did not consider the agreement binding upon himself or the court in Kentucky. They ignored it and its provisions in his action; the provisions of the agreement for the custody of the child and for allowances to the child and Mrs. Atherton were not carried into the judgment in that action; no allowance was made either for the child or for Mrs. Atherton. Having thus ignored the agreement in his action, he cannot justly complain that she disregarded it in her action.

Fourth.

What, then, will be the decision of this court as to the effect of the judgment obtained in Kentucky by Mr. Atherton, a resident and citizen of that State, against his wife, a resident and citizen of the State of New York? It is a most important question and upon its decision will

rest much of good or evil for our country and its people. The already large number of divorces, increasing yearly in a greater proportion than the increase of our population,and carrying with them the right to the parties to again marry, is arousing in the minds of all truly Christian people a most profound alarm. The number of divorced men and women now living in this country and who have again married, aggregate at this time, hundreds of thousands. It is indisputable that such a condition of affairs speaks far from well for the morals of our people. This divorce evil has already become so great that religious denominations are raising their voices in solemn protest. But recently a prominent bishop at a diocesan convention in New York, speaking of the growing tendency of divorces in this country, and in favor of a canon forbidding the remarriage of divorced parties, said: "In this "direction nothing has been more serious than those re- "sults which have affected the family and especially the "institutions and obligations of marriage. These last have "come to be so lightly regarded that now, at length, the "least thoughtful among us are beginning to realize the "vicious tendencies in some forty or fifty different com- "monwealths of our composite and contradictory legisla- "tion,and to recognize that the facility with which the mar- "riage relation may be taken on and put off is a menace to "the foundations of society and the jest of the civilized "world."

The case now before the court is not one where courts are called upon to strain the law. On the contrary, it is far better that the most strict construction should be maintained so that the applications for and the obtaining of divorces should be as far as possible checked. For the greater the check and the more legal obstructions that can be put in the way, the less will be the applications therefor and the better will be the morals of our people.

We submit upon sound reason and authority that this court should apply the same rule to the judgment in question, that is uniformly applied in actions *in personam*, brought by a resident and citizen of one State against a resident and citizen of another State; to disregard the idea that the marital relation creates a *status*, and that such *status* is a *res*, and therefore, actions for divorce are actions *in rem;* to treat such actions as actions *in personam;* and to hold that the action in Kentucky was an action *in personam;* and that the judgment therein obtained, upon substituted service only, and without any appearance on the part of the defendant, was and is absolutely null and void, inoperative and of no force or effect, either in Kentucky, New York, or any other State. If such course is taken, a great many troublesome questions, and conditions, and much conflict between the States, as to the effect of such judgments within their respective boundaries, will be avoided, and cease to a great extent. We will be rid of the conditions, that in one State the marriage is dissolved while in another State it remains in full force; and that in one State a man or woman is single and free to marry, while in another State he or she is married and remains subject to all the obligations of marriage.

The objection to such a decision is made, that if such a rule should be adopted and enforced in divorce actions some innocent parties might suffer; that one of the married parties, guilty of acts for which by the law of the State of which they are residents, a divorce may be granted, may have removed to a State where no divorce is permitted, and unless the other party can bring an action in the State of his or her residence, and maintain it upon substituted service, he or she would be without redress. Conceding this, does it give a sufficient reason for the courts to change the law, and make an exception to a long established rule? Though some might suffer, we do not believe their number would bear any compari-

son with the great number of innocent parties who will suffer, if the rule contended for by the plaintiff in error should be adopted. If his contention should prevail, how many innocent parties will be hereafter divorced without any hearing whatever; parties who never heard of any proceedings against them, or, hearing of them, have not been able to attend in a distant State and defend the unjust actions brought against them? Where one innocent party may suffer in the first case, hundreds will suffer in the latter case.

But if the court shall be of the opinion that such judgments in divorce actions, obtained upon substituted service, are valid in the State where rendered; that the judgment obtained in Kentucky by Mr. Atherton was valid and dissolved the marriage between himself and wife in that State; then we submit that it was not and is not valid, and has no force or effect in the State of New York, against Mrs. Atherton. This is in accordance with the most just rule recognized and acted upon, not only by this court, but by all civilized countries, that no man shall be condemned until after he has had an opportunity to defend himself, and that no man shall be deprived of his rights until after he has had an opportunity to be heard. Any other rule would be a violation of natural justice and most repugnant to the minds and instincts of all just men.

To hold such judgments valid, and to give them full force and effect against the defendants, in the States of their residence and in all the other States, would greatly facilitate divorces, and largely increase their number from year to year. Any State could pass laws giving to its courts power to grant divorces for most trivial causes, and providing for a substituted service of process which would probably never reach or come to the knowledge of the defendants. And judging the future by the

past, large numbers of persons in the other States, would seek the courts of that State, many, if not all of them, without real just cause, and they would there get divorces. The evils resulting to our country from such a state of affairs, no man can tell.

Fifth.

The judgment of the New York court should be affirmed.

WILLIAM KERNAN,
Counsel for Defendant in Error,
Utica, N. Y.

Supreme Court of the United States.

No. 17.—October Term, 1900.

Peter Lee Atherton, Plaintiff in Error, *vs.* Mary G. Atherton. } In error to the Supreme Court of the State of New York.

This was a suit brought January 11, 1893, in the Supreme Court of the State of New York, by Mary G. Atherton against Peter Lee Atherton, for a divorce from bed and board, for the custody of the child of the parties, and for the support of the plaintiff and the child, on the ground of cruel and abusive treatment of the plaintiff by the defendant. The defendant appeared in the case; and at a trial by the court without a jury at June term, 1893, the court found the following facts:

On October 17, 1888, the parties were married at Clinton, Oneida County, New York, the plaintiff being a resident of that place, and the defendant a resident of Louisville, Kentucky. Immediately after the marriage, the parties went to and resided at Louisville, in the house with the defendant's parents, had a child born to them on January 8, 1890, and there continued to reside as husband and wife until October 3, 1891. Then, owing to his cruel and abusive treatment, without fault on her part, she left him, taking the child with her, and in a few days thereafter, returned to her mother at Clinton, and has ever since resided there with her mother, and is a resident and domiciled in the State of New York, and has not lived or cohabited with the defendant. When she so left him and went to Clinton, she did so with the purpose and intention of not returning to the State of Kentucky, but of permanently residing in the State of New York; and this purpose and intention were understood by the defendant at the time, and were contemplated and evidenced by an agreement entered into, at Louisville, October 10, 1891, by the parties and one Henry P. Goodenow, under advice of counsel, which is copied in the margin.* The defendant continued to reside in Louisville, and is a resident of the State of Kentucky.

The defendant, in his answer, besides denying the cruelty charged, set up a decree of divorce from the bond of matrimony, obtained by him against his wife March 14, 1893, in a court of Jefferson County in the State of Kentucky, empowered to grant divorces, by which "This action

*The undersigned, Peter Lee Atherton, and his wife, Mary G. Atherton, having ceased to live together as man and wife, without in any way acknowledging upon whom is the fault, or condoning the conduct of the one or the other which has led to the existing state of affairs, or preventing any consequence which may follow, or

having come on to be heard upon the pleadings, report of attorney for the absent defendant, and the evidence, and the court being advised, it is considered by the court that the plaintiff, Peter Lee Atherton, has resided in Jefferson County, Kentucky, continuously for ten years last past; and that he and the defendant, Mary G. Atherton, were married on the 17th day of October, 1888; that from the date of said marriage the said plaintiff and defendant resided in Jefferson County, Kentucky; that while the plaintiff

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right which may arise to either party if such status shall continue, desire to provide for the best interest of their child, Mary Valeria Atherton. With this view they have entered into the following agreement:

Peter Lee Atherton contracting with Henry P. Goodenow as trustee for Mary G. Atherton, and said trustee contracting with Peter Lee Atherton on behalf and jointly with Mary G. Atherton.

1. The child is hereby committed for its nurture, education and control to the joint custody and guardianship of her mother, Mary G. Atherton, and her paternal grandmother, Maria B. Atherton, on the following basis:

The domicil of the child is to be the State of Kentucky. The mother is to have the child until January 1, 1892. During the years 1892, 1893 and 1894 the grandmother is to have the child and control its abode, travel and custody from January 1st to the first week in May; and the mother from the first week in May to December 31st. After that period, during the existence of this arrangement, the grandmother's custody, control, etc., is to exist during the first four and last two months of the year; that of the mother during the other months of the year.

2. During that part of each year in which the child is under the control of the mother, Peter Lee Atherton is to pay into the hands of Mary G. Atherton $500 in instalments of equal amounts at the beginning of each of the months of said control, for the comfortable maintenance of the child. During the rest of each year, he is to himself at his sole expense provide for the support of the child The expense of conveying the child, with a proper attendant in the journey, to the mother, Mary G. Atherton, is to be borne by the father, Peter Lee Atherton, and the like expense, on the journey back to the grandmother, is to come out of the sum provided for the child's support.

3. Peter Lee Atherton is to pay into the hands of Mary G. Atherton for her support $125 at the beginning of each month, until this agreement does by its own terms end. This is to be taken in lieu of alimony and dowable and distributable share in his estate.

4. The following provisions are made for the termination of this agreement, and for the contingency of various events that may happen in the future; among others, divorce and second marriage of Peter Lee Atherton or Mary G. Atherton.

a. This agreement as to the child is to terminate on her arrival at fourteen years of age, it being recognized that she will then be old enough to choose for herself It shall, of course, in like manner terminate at her death.

b. This agreement as to the support of Mary G. Atherton is to end at her death, or upon her again marrying, and in any event on the 8th day of January, 1904.

c. If Mary G. Atherton shall marry again or die, the person then being joint guardian with her of the child shall become its sole guardian. If Maria B. Atherton shall die while she is joint guardian, Peter Lee Atherton, if alive, or if he be

and defendant were thus residing in Jefferson County, Kentucky, to wit, in the month of October, 1891, the defendant, Mary G. Atherton, without fault upon the part of the plaintiff, abandoned him, and that said abandonment has continued without interruption from that time to this, and at the filing of the petition herein had existed for more than one year; that the defendant, Mary G. Atherton, had, at the filing of the petition herein, been absent from this State for more than four months; that therefore it is further considered and adjudged by the court that the plaintiff, Peter Lee Atherton, is entitled to the decree of divorce prayed for in this petition, and that the bonds of matrimony between the said plaintiff, Peter Lee Atherton, and the said defendant, Mary G. Atherton, be and they are hereby dissolved."

By the record of that decree, duly verified, the following appeared: On December 28, 1892, the plaintiff filed a petition under oath, containing the same statements as the decree, and also stating "that the said defendant may be found in Clinton, State of New York, and that in said Clinton is kept the post-office which is nearest to the place where the defendant may be found." On the same day, pursuant to the requirements of the statutes of Kentucky, the clerk made an order, warning the defendant to appear within sixty days and answer the petition, and appointing John C. Walker, an attorney of the court, to defend for her and in her behalf, and to inform her of the nature and pendency of the suit. On February 6,

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dead, his father, John M. Atherton, shall choose a successor in the joint guardianship; and if Mary G. Atherton objects to the person so nominated, the senior (in years) judge of the Jefferson circuit court shall decide the question of fitness, and confirm or reject such nomination.

d. A successor to said successor may under similar circumstances be in like manner chosen.

e. If, during the existence of this agreement, Mary G. Atherton being then joint guardian, John M. Atherton and Maria B. Atherton shall die, and Peter Lee Atherton die or be or become married, the sole guardianship shall rest in said Mary G. Atherton.

f. If, during the lives of Peter Lee Atherton and Mary G. Atherton, a sole guardianship shall have resulted under the terms of this agreement, each parent shall have reasonable access to and right of visitation from the child, notwithstanding such parent may have again married.

g. If a divorce shall be granted, this agreement, so far as it concerns provision for Mary G. Atherton, shall be carried into the decree, as in full satisfaction of all claim for alimony, and so far as concerns provision for and custody of the child, reserving to the court the usual power to provide against events and contingencies not covered by this agreement.

Witness the signatures of all the parties this October 10th, 1891.

HENRY P. GOODENOW.
MARY G. ATHERTON.
PETER LEE ATHERTON.

1893, Walker filed his report, in which he stated: "On this, the 5th day of January, 1893, I wrote to said defendant, Mary G. Atherton, at Clinton, in the State of New York, fully advising her of the objects and purposes of this action, stating therein a substantial copy of the petition, &c., plainly directed said letter to her at said place, paid the postage, had printed on the envelope enclosing it, 'If not delivered in ten days return to Jno. C. Walker, attorney at law, No. 516 West Jefferson street, Louisville, Ky.' Said letter has not been returned to me. I have received no answer thereto from said defendant or any one else for her, and do not know nor am I advised of any defence to make for her, and make none, only that which the law in such cases makes for non-resident defendants." The agreement of October 10, 1891, before mentioned, and certain depositions, set forth in full, taken at various dates from February 23 to March 3, 1893, were filed in the cause in Kentucky before the hearing.

It was agreed that either party might refer to any statute of the State of Kentucky, or decision of its courts.

The Supreme Court of New York found that the wife "was not personally served with process within the State of Kentucky, or at all, nor did she in any manner appear, or authorize an appearance for her, in the said action and proceeding;" and that before the commencement of that suit, and ever since, she had ceased to be a resident of Kentucky, and had become and was a resident of the State of New York, domiciled and residing in Clinton, with her child.

The court decided that the decree in Kentucky was inoperative and void as against the wife, and no bar to this action; and gave judgment in her favor for a divorce from bed and board, and for the custody of the child, and for the support of herself and the child.

That judgment was affirmed by the general term of the Supreme Court of New York, and by the Court of Appeals of the State. 32 Hun, 179; 155 N. Y. 129.

The defendant sued out this writ of error, on the ground that the judgment did not give full faith and credit to the decree of the court in Kentucky, as required by the Constitution and laws of the United States.

[April 15, 1901.]

Mr. Justice GRAY, after stating the case as above, delivered the opinion of the Court.

The first section of the fourth article of the Constitution of the United States is as follows: "Full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State. And the Congress may, by general laws, prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof."

This section was intended to give the same conclusive effect to the judgments of all the States, so as to promote certainty and uniformity in the rule among them. And Congress, in the exercise of the power so conferred, besides prescribing the manner in which the records and judicial proceedings of any State may be authenticated, has defined the effect thereof, by enacting that "the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken." Rev. Stat. § 905, rëenacting act of May 26, 1790, c. 11, 1 Stat. 122; *Huntington* v. *Attrill*, (1892) 146 U. S. 657, 684.

By the General Statutes of Kentucky of 1873, c. 52, art. 3, courts of equity may grant a divorce for abandonment by one party of the other for one year; petitions for divorce must be brought in the county where the wife usually resides if she has an actual residence in the State; if not, then in the county of the husband's residence; and shall not be taken for confessed, or be sustained by confessions of the defendant alone, but must be supported by other proofs.

By the Civil Code of Practice of Kentucky of 1876, tit. 4, c. 2, art. 2, if a defendant has been absent from the State four months, and the plaintiff files an affidavit stating in what country the defendant resides or may be found and the name of the place wherein a post-office is kept nearest to the place where the defendant resides or may be found, the clerk may make an order warning the defendant to defend the action within sixty days; and shall at the same time appoint, as attorney for the defendant, a regular practising attorney of the court, whose duty it shall be to make diligent efforts to inform the defendant by mail concerning the pendency and nature of the action against him, and to report to the court the result of his efforts; and a defendant against whom a warning order is made, and for whom an attorney is appointed, is deemed to have been constructively summoned on the thirtieth day thereafter, and the action may proceed accordingly.

In accordance with these statutes, on December 28, 1892, the husband filed in a proper court of Kentucky a petition, under oath, for a divorce from the bond of matrimony, alleging his wife's abandonment of him ever since October, 1891, and that she had been absent from the State for more than four months, and might be found at Clinton in the State of New York, and that in Clinton was kept the post-office nearest the place where she might be found; and the clerk entered a warning order, and appointed an attorney at law for the defendant. On January 5, 1893, that attorney wrote to the wife at Clinton, fully advising her of the object of the petition for divorce, and enclosing a copy thereof, in a letter addressed to her by mail at that place, and having printed on the envelope a direction to return

it to him, if not delivered within ten days. On February 6, 1893, the attorney, not having received that letter again, or any answer from the defendant, or in her behalf, made his report to the court. And on March 14, 1893, the court, after taking evidence, including an agreement made by the parties in Kentucky, October 10, 1891, as to the domicil, custody and support of their child, granted to the husband an absolute divorce for his wife's abandonment of him.

There can be no doubt that this decree was by law and usage entitled to full faith and credit as an absolute decree of divorce in the State of Kentucky. The Court of Appeals of that State has held that, under its statutes, a wife residing in the State was entitled to obtain a decree of divorce against a husband who had left the State, or who had never been within it; and Chief Justice Robertson said: "It would be a reproach to our legislation if a faithless husband in Kentucky could, by leaving the State, deprive his abandoned wife of a power of obtaining a divorce at home." *Rhyms* v. *Rhyms*, (1870) 7 Bush, 316; *Perzel* v. *Perzel*, (1891) 91 Kentucky, 634. That court has recognized that the regulation of divorce belongs to the legislature of the domicil of the parties. *Maguire* v. *Maguire*, (1838) 7 Dana, 181, 185–187. And the same court, where husband and wife had lived together in Kentucky, and she abandoned him, and he became a *bona fide* citizen of Indiana, held that a divorce from the bonds of matrimony, obtained by him against the wife in that State, by proceedings on constructive service, and according to the laws of that State, determined the status of the parties in Kentucky. *Hawkins* v. *Ragsdale*, (1882) 80 Kentucky, 353.

There is a weight of authority in accord with the views maintained by the Court of Appeals of Kentucky, although there are some decisions of learned courts to the contrary.

The purpose and effect of a decree of divorce from the bond of matrimony, by a court of competent jurisdiction, are to change the existing status or domestic relation of husband and wife, and to free them both from the bond. The marriage tie, when thus severed as to one party, ceases to bind either. A husband without a wife, or a wife without a husband, is unknown to the law. When the law provides, in the nature of a penalty, that the guilty party shall not marry again, that party, as well as the other, is still absolutely freed from the bond of the former marriage.

The rule as to the notice necessary to give full effect to a decree of divorce is different from that which is required in suits *in personam*.

In *Pennoyer* v. *Neff*, (1877) 95 U. S. 714, 734, this court, speaking by Mr. Justice Field, while deciding that a judgment of a State court on a debt could not be supported without personal service on the defendant within the State or his appearance in the cause, took occasion to say: "To pre-

vent any misapplication of the views expressed in this opinion, it is proper to observe that we do not mean to assert, by anything we have said, that a State may not authorize proceedings to determine the status of one of its citizens towards a non-resident, which would be binding within the State, though made without service of process or personal notice to the non-resident. The jurisdiction which every State possesses to determine the civil status and capacities of all its inhabitants involves authority to prescribe the conditions on which the proceedings affecting them may be commenced and carried on within its territory. The State, for example, has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved. One of the parties, guilty of acts for which, by the law of the State, a dissolution may be granted, may have removed to a State where no dissolution is permitted. The complaining party would therefore fail if a divorce were sought in the State of the defendant; and if application could not be made to the tribunals of the complainant's domicil in such case, and proceedings be there instituted without personal service of process or personal notice to the offending party, the injured citizen would be without redress. 2 Bishop on Marriage and Divorce, § 156."

In *Cheeley* v. *Clayton*, (1884) 110 U. S. 701, which involved the validity of a decree of divorce, obtained in Colorado by a husband domiciled there, against his wife for unjustifiably refusing to live with him, this court said: "The courts of the State of the domicil of the parties doubtless have jurisdiction to decree a divorce in accordance with its laws, for any cause allowed by those laws, without regard to the place of the marriage, or to that of the commission of the offence for which the divorce is granted; and a divorce so obtained is valid everywhere. Story Conflict of Laws, § 230*a*; *Cheever* v. *Wilson*, 9 Wall. 108; *Harvey* v. *Farnie*, 8 App. Cas. 43. If a wife is living apart from her husband without sufficient cause, his domicil is in law her domicil; and in the absence of any proof of fraud or misconduct on his part, a divorce obtained by him in the State of his domicil, after reasonable notice to her, either by personal service or by publication in accordance with its laws, is valid, although she never in fact resided in that State. *Burlen* v. *Shannon*, 115 Mass. 438; *Hunt* v. *Hunt*, 72 N. Y. 218. But in order to make the divorce valid, either in the State in which it is granted or in another State, there must, unless the defendant appeared in the suit, have been such notice to her as the law of the first State requires." 110 U. S. 705. In that case the decree of divorce was held void, because the notice required by the laws of the State had not been given; and the finding of the court below that the wife, at the time of the proceedings for divorce, was a citizen and resident of the State of Illinois, was given no weight, because, as this court said, it was hard to see how, if she unjustifiably refused to live with her husband in Colorado, she could

lawfully acquire in his lifetime a separate domicil in another State; or how, if the Colorado court had jurisdiction to render the decree of divorce, and did render it upon the ground of her unlawful absence from him, the finding of the court below could consist with the fact so adjudged in the decree of divorce. 110 U. S. 709.

In *Harding* v. *Alden*, (1832) 9 Greenl. 140, the husband and wife lived together in Maine. He deserted her, and took up a residence in North Carolina, and there married and lived with another woman. The first wife then moved to and resided in Providence, Rhode Island, and there filed a libel in the Supreme Judicial Court for an absolute divorce against him for his desertion and adultery; and the court, after service of a citation on him, and two continuances of the cause, decreed a divorce as prayed for. The husband was never an inhabitant of Rhode Island. The wife afterwards married another man. The Supreme Judicial Court of Maine, in an opinion delivered by Mr. Justice Weston, held that the divorce in Rhode Island dissolved the bond of marriage between the parties; and said: "If we refuse to give full faith and credit to the decree of the Supreme Judicial Court of Rhode Island, because the party libelled had his domicil in another State, and was not within their jurisdiction, we refuse to accord to the decrees of that court the efficacy we claim for our own, when liable to the same objection. In the case before us, it is agreed that the party injured was at the time an inhabitant of Rhode Island, residing in Providence, and this fact is recited in the decree. It appears that by order of the court a citation was served upon the defendant in person; and that a continuance was twice granted, to give him an opportunity to appear in defence. This shows a due regard to that principle of justice, which gives to the party accused the right to be heard. The decree was rendered by the highest judicial tribunal in that State. As it belongs to that tribunal to declare, authoritatively and definitively, what the law of the State is, we are bound to infer that by that law the bonds of matrimony, previously existing between the libellant and her former husband, were thereby dissolved; and that such is the effect of the decree within the State of Rhode Island." 9 Greenl. 148. "There would be great inconvenience in holding that a divorce decreed in the State where the injured party resided might not be held valid through the Union, where the right of citizenship is common, where the party accused had established his domicil in another State, and there committed adultery. And this is the only objection to the efficacy of the decree in question; it being insisted that the court had no jurisdiction over the absent party. As has been before intimated, it would apply with equal force to many divorces decreed in this State. It would require that the wife, abandoned and dishonored, should seek the new domicil of the guilty husband, *animo manendi*, before she could claim the benefit of the law to be relieved from his control. In giving effect here to the divorce decreed

in Rhode Island, we would wish to be understood, that the ground upon which we place our decision is limited to the dissolution of the marriage. In the libel, alimony was prayed for; and certain personal property, then in the possession of the wife, was decreed to her. Had the court awarded her a gross sum, or a weekly or an annual allowance, to be paid by the husband, and the courts of this or any other State had been resorted to to enforce it, a different question would be presented." 9 Greenl. 151.

Chancellor Kent, in his Commentaries, says of that case that it was there held "that a decree of divorce did not fall within the rule that a judgment rendered against one not within the State, nor bound by its laws, nor amenable to its jurisdiction, was not entitled to credit against the defendant in another State; and that divorces pronounced according to the law of one jurisdiction, and the new relations thereupon formed, ought to be recognized, in the absence of all fraud, as operative and binding everywhere, *so far as related to the dissolution of the marriage*, though not as to other parts of the decree, such as an order for the payment of money by the husband." And the Chancellor adds, "This is an important and valuable decision." 2 Kent Com. 110 note.

In *Ditson* v. *Ditson*, (1856) 4 Rhode Island, 87, (of which Judge Cooley, in his Treatise on Constitutional Limitations, 403 note, says there is no case in the books more full and satisfactory upon the whole subject of jurisdiction in divorce suits,) the Supreme Court of Rhode Island, in an elaborate opinion by Chief Justice Ames, affirmed its jurisdiction, upon constructive notice by publication, to grant a divorce to a wife domiciled in Rhode Island against a husband who had never been in Rhode Island, and whose place of residence was unknown; and said: "It is obvious that marriage, as a domestic relation, emerged from the contract which created it, is known and recognized as such throughout the civilized world; that it gives rights and imposes duties and restrictions upon the parties to it, affecting their social and moral condition, of the measure of which every civilized State, and certainly every State of this Union, is the sole judge so far as its own citizens or subjects are concerned, and should be so deemed by other civilized, and especially sister States; that a State cannot be deprived, directly or indirectly, of its sovereign power to regulate the status of its own domiciled subjects and citizens, by the fact that the subjects and citizens of other States, as related to them, are interested in that status; and in such a matter has a right, under the general law, judicially to deal with and modify or dissolve this relation, binding both parties to it by the decree, by virtue of its inherent power over its own citizens and subjects, and to enable it to answer their obligatory demands for justice; and finally, that in the exercise of this judicial power, and in order to the validity of a decree of divorce, whether *a mensa et thoro* or *a vinculo matrimonii*, the general law does not deprive a State of its proper jurisdiction over the

condition of its own citizens, because non-residents, foreigners or domiciled inhabitants of other States have not or will not become, and cannot be made to become, personally subject to the jurisdiction of its courts; but upon the most familiar principles, and as illustrated by the most familiar analogies of general law, its courts may and can act conclusively in such a matter upon the rights and interests of such persons, giving to them such notice, actual or constructive, as the nature of the case admits of, and the practice of courts in similar cases sanctions." 4 Rhode Island, 105, 106.

The statutes of Massachusetts provided as follows: "When an inhabitant of this State goes into another State or country to obtain a divorce for any cause occurring here, and whilst the parties resided here, or for any cause which would not authorize a divorce by the laws of this State, a divorce so obtained shall be of no force or effect in this State. In all other cases, a divorce decreed in any other State or country according to the laws thereof, by a court having jurisdiction of the cause and both the parties, shall be valid and effectual in this State." That provision made no change in the law, but, in the words of the Commissioners upon whose advice it was first enacted, "is founded on the rule established by the comity of all civilized nations; and is proposed merely that no doubt should arise on a question so interesting and important as this may sometimes be." Gen. Stat. of 1860, c. 107, §§ 54, 55; Rev. Stat. of 1836, c. 76, §§ 39, 40, and note of Commissioners; *Ross* v. *Ross*, 129 Mass. 243, 248.

In *Hood* v. *Hood*, (1865) 11 Allen, 196, the husband and wife, after living together in Massachusetts, removed to Illinois, and there lived together; the wife, "under circumstances as to which there was no evidence," and afterwards the husband, came back to Massachusetts, and, while they were living there in his brother in law's house for a few weeks, he signed an agreement, reciting that they had separated, and promising to pay her a certain weekly sum so long as she should remain single. She continued to reside in Massachusetts; and he obtained in Illinois a decree of divorce from her for her desertion, upon such notice as the laws of Illinois authorized in the case of an absent defendant. It was held by the Supreme Judicial Court of Massachusetts, in an opinion delivered by Mr. Justice Hoar, that both parties had their domicil in Illinois, and were subject to the jurisdiction of its courts; and that the fact of desertion by the wife was conclusively settled between the parties by the decree in Illinois, and it was not competent for the wife to contradict it on a libel afterwards filed by her in Massachusetts; and her libel was dismissed. And in *Hood* v. *Hood*, (1872) 110 Mass. 463, it appearing that such dismissal was upon the ground of the validity of the previous decree of divorce in Illinois, it was adjudged that that decree could not be impeached by the wife in a writ of dower by her against third persons, the court saying: "The decree in favor of her husband, dismissing her libel, was then forever

conclusive against her, as between themselves. It severed the relation between them; or rather estopped her from averring anything to the contrary of the decree in Illinois which purported to sever that relation. The general rule, however, in regard to estoppels of record, is that they are good only between the parties of record and their privies. They cannot be set up in collateral proceedings between one of those parties and third persons. But the effect of the judgment in this case was to determine the status of the demandant. So far as it did that, it is a judgment that is operative and conclusive as to all the world."

The like view has been affirmed by courts of other States. *Thompson* v. *State*, (1856) 28 Alabama, 13; *Leith* v. *Leith*, (1859) 39 N. H. 20, 39–43; *Shafer* v. *Bushnell*, (1869) 24 Wisconsin, 372; *Gould* v. *Crow*, (1874) 57 Missouri, 200; *Van Orsdal* v. *Van Orsdal*, (1885) 67 Iowa, 35; *Smith* v. *Smith*, (1891) 43 La. Ann. 1140; *In re James*, (1893) 99 California, 374; *Dunham* v. *Dunham*, (1896) 162 Illinois, 589, 607–610.

In *Shaw* v. *Shaw*, (1867) 98 Mass. 158, the husband and wife, domiciled in Massachusetts, left the State to take up their residence in Colorado. In Pennsylvania, on the journey, he treated her with extreme cruelty, and she left him and returned to Massachusetts, and continued to reside there. It was held that while they were in Pennsylvania the domicil of both parties remained in Massachusetts; and that the wife might maintain a libel in Massachusetts for the cause occurring in Pennsylvania, although the husband before it occurred had left Massachusetts with the intention of never returning, and never did in fact return, and therefore no notice was or could be served upon him in Massachusetts.

In a very recent case, the Court of Errors of New Jersey maintained the validity of a divorce obtained in the State of Utah by a husband, having his *bona fide* domicil there, against a wife whose domicil was in New Jersey, after publication of the process and complaint in accordance with the statutes of Utah, and personal service upon the wife in New Jersey in time to enable her to make defence, if she wished to do so. Mr. Justice Gummere, speaking for the Court of Errors, said that, at least, "interstate comity requires that a decree of divorce, pronounced by a court of the State in which the complainant is domiciled, and which has jurisdiction of the subject-matter of the suit, shall, in the absence of fraud, be given full force and effect within the jurisdiction of a sister State, notwithstanding that the defendant does not reside within the jurisdiction of the court which pronounced the decree, and has not been served with process therein; provided that a substituted service has been made in accordance with the provisions of the statute of that State, and that actual notice of the pendency of the suit has been given to the defendant, and a reasonable opportunity afforded to put in a defence thereto; and provided, further, that the ground upon which the decree rests is one which the

public policy of the State in which it is sought to be enforced recognizes as a sufficient cause for divorce." *Felt* v. *Felt*, (1899) 14 Dickinson (59 N. J. Eq.)

In New York, North Carolina and South Carolina, the opposite view has prevailed, either upon the ground that the rule as to notice is the same in suits for divorce as in ordinary suits *in personam*, or upon the ground that, in the absence of actual notice or appearance, the decree, while it may release the libellant, cannot release the libellee, from the bond of matrimony. *People* v. *Baker*, (1879) 76 N. Y. 78; *O'Dea* v. *O'Dea*, (1885) 101 N. Y. 23; *In re Kimball*, (1898) 155 N. Y. 62; *Irby* v. *Wilson*, (1837) 1 Dev. & Bat. Eq. 568; *McCreery* v. *Davis*, (1894) 44 So. Car. 195.

In *People* v. *Baker*, 76 N. Y. 78, upon which the subsequent decisions in New York are based, the defendant was married to a woman in the State of Ohio; they afterwards lived together in the State of New York; the wife, upon notice by publication, and without personal appearance of the husband, he being in New York, obtained a decree of divorce against him in Ohio; and he afterwards married another woman in New York, and was convicted of bigamy there. The conviction was affirmed by the Court of Appeals, without a suggestion that the first wife was not domiciled in Ohio at the time of the divorce, but stating the question in the case to be: "Can a court, in another State, adjudge to be dissolved and at an end the matrimonial relation of a citizen of this State, domiciled and actually abiding here throughout the pendency of the judicial proceedings there, without a voluntary appearance by him therein, and with no actual notice to him thereof, and without personal service of process on him in that State?" The court admitted that "if one party to a proceeding is domiciled in a State, the status of that party, as affected by the matrimonial relation, may be adjudged upon and confirmed or changed, in accordance with the laws of that State;" but held that, without personal appearance or actual notice, the decree could not affect the matrimonial relation of the defendant in another State. The court recognized that the law was settled otherwise in some States, and said: "It remains for the Supreme Court of the United States, as the final arbiter, to determine how far a judgment rendered in such a case, upon such substituted service of process, shall be operative without the territorial jurisdiction of the tribunal giving it."

The authorities above cited show the wide diversity of opinion existing upon this important subject, and admonish us to confine our decision to the exact case before us.

This case does not involve the validity of a divorce granted, on constructive service, by the court of a State in which only one of the parties ever had a domicil; nor the question to what extent the good faith of the domicil may be afterwards inquired into. In this case, the divorce in

Kentucky was by the court of the State which had always been the undoubted domicil of the husband, and which was the only matrimonial domicil of the husband and wife. The single question to be decided is the validity of that divorce, granted after such notice had been given as was required by the statutes of Kentucky.

The husband always had his domicil in Kentucky, and the matrimonial domicil of the parties was in Kentucky. On December 28, 1892, the husband filed his petition for a divorce in the court of appropriate jurisdiction in Kentucky, alleging an abandonment of him by the wife in Kentucky, and a continuance of that abandonment for a year, which was a cause of divorce by the laws of Kentucky. His petition truly stated, upon oath, as required by the statutes of Kentucky, that the wife might be found at Clinton in the State of New York, and that at Clinton was the post-office nearest the place where she might be found. As required by the statutes of Kentucky, the clerk thereupon entered a warning order to the wife to appear in sixty days, and appointed an attorney at law to represent her. The attorney, on January 5, 1893, wrote to the wife at Clinton, fully advising her of the object of the petition for divorce, and enclosing a copy thereof, in a letter addressed to her by mail at Clinton, and having printed on the envelope a direction to return it to him, if not delivered in ten days. There is a presumption of fact, though not of law, that a letter, put into the post-office, and properly addressed, is received by the person to whom it is addressed. *Rosenthal* v. *Walker*, (1884) 111 U. S. 185. On February 6, 1893, the attorney, having received no answer, made his report to the court. And on March 14, 1893, the court, after taking evidence, granted the husband an absolute decree of divorce for his wife's abandonment of him.

The court of New York has indeed found that the wife "was not personally served with process within the State of Kentucky, or at all." It may be doubted whether this negatives her having received, or had knowledge of, the letter sent to her by the attorney in Kentucky, January 5, 1893, six days before she began her suit in New York. But assuming that it does, the question in this case is not whether she had actual notice of the proceedings for divorce, but whether such reasonable steps had been taken to give her notice, as to bind her by the decree in the State of the domicil.

The court in New York found that the wife left the husband and went to Clinton with the purpose and intention of not returning to the State of Kentucky, but of permanently residing in the State of New York; and that this purpose and intention were understood by the husband at the time, and were contemplated and evidenced by the agreement executed by the parties in Kentucky, October 10, 1891. But that agreement was among the proofs submitted to the court in Kentucky, and may well have been

considered by that court, as the preamble to the agreement states, as simply intended to provide for the interest of their child, recognizing that the parties had ceased to live together as husband and wife, but "without in any way acknowledging upon whom is the fault, or condoning the conduct of the one or the other which has led to the existing state of affairs, or preventing any consequence which may follow, or right which may arise to either party if such status shall continue." The agreement contains no mention of the domicil of either husband or wife, but declares that the domicil of the child is to be the State of Kentucky, and is taken up with providing that its custody shall be half of each year with the mother, and the other half with the paternal grandmother, and with providing for the support and custody of the child, in various future contingencies, including the divorce and second marriage of the husband or of the wife.

We are of opinion that the undisputed facts show that such efforts were required by the statutes of Kentucky, and were actually made, to give the wife actual notice of the suit in Kentucky, as to make the decree of the court there, granting a divorce upon the ground that she had abandoned her husband, as binding on her as if she had been served with notice in Kentucky, or had voluntarily appeared in the suit. Binding her to that full extent, it established, beyond contradiction, that she had abandoned her husband, and precludes her from asserting that she left him on account of his cruel treatment.

To hold otherwise would make it difficult, if not impossible, for the husband to obtain a divorce for the cause alleged, if it actually existed. The wife not being within the State of Kentucky, if constructive notice, with all the precautions prescribed by the statutes of that State, were insufficient to bind her by a decree dissolving the bond of matrimony, the husband could only get a divorce by suing in the State in which she was found; and by the very fact of suing her there he would admit that she had acquired a separate domicil, (which he denied,) and would disprove his own ground of action that she had abandoned him in Kentucky.

The result is that the courts of New York have not given to the Kentucky decree of divorce the faith and credit which it had by law in Kentucky, and that therefore their

Judgments must be reversed, and the case remanded to the Supreme Court of New York for further proceedings not inconsistent with this opinion.

True copy.

Test:

Clerk Supreme Court, U. S.

Supreme Court of the United States.

No. 17.—October Term, 1900.

Peter Lee Atherton, Plaintiff in Error, vs. Mary G. Atherton. } In error to the Supreme Court of the State of New York.

[April 15, 1901.]

Mr. Justice Peckham dissenting.

I think this case was rightly decided by the Court of Appeals of New York, and I therefore dissent from the judgment and the opinion of the court herein.

I think if the husband had, at his domicil in Kentucky, been guilty of such misconduct and cruelty towards his wife as entitled her to a divorce, she had a legal right for that reason to leave him and to acquire a separate domicil, even in another State. If, under such circumstances, she did leave him, and did acquire a separate domicil in New York State, the Kentucky court did not obtain jurisdiction over her as an absent defendant, by publication of process or sending a copy thereof through the mail to her address in New York.

It has long been held that the wife upon such facts could acquire a separate domicil. In *Cheever* v. *Wilson*, (9 Wall. 108, 123, 124,) it was so decided, and the case of *Ditson* v. *Ditson*, (4 R. I. 87,) was therein cited with approval upon that proposition. It was said in the Rhode Island case that "Although as a general doctrine the domicil of the husband is by law that of the wife, yet when he commits an offense, or is guilty of such dereliction of duty in the relation as entitled her to have the marriage either partially or totally dissolved, she not only may but *must*, to avoid condonation, establish a separate domicil of her own. This she may establish, nay, when deserted, or compelled to leave her husband, necessity frequently compels her to establish it in a different judicial or State jurisdiction than that of her husband, according to the residence of her family or friends. Under such circumstances she gains, and is entitled to gain, for the purposes of jurisdiction, a domicil of her own." This is also held in *Hunt* v. *Hunt*, (72 N. Y. 217,) where many of the authorities are collected.

By the statute of New York in force at the time the parties were therein married, the court had jurisdiction to grant a limited divorce on the complaint of a married woman, where the marriage had been solemnized in the State and the wife was an actual resident therein at the time of ex-

hibiting her complaint. By virtue of this statute and of the wife's residence in New York at the time of exhibiting her complaint, (if such residence were legally acquired, as already stated,) the court in that State had jurisdiction of an action for divorce against her husband, and jurisdiction over the husband was complete when he appeared in the suit. Having the right to acquire a residence in the State, it was open to her to prove in the divorce case which she instituted in New York the facts which justified her leaving her husband's home in Kentucky and in acquiring a separate domicil in New York, and the decision of the Kentucky court, that it had jurisdiction over her in her husband's suit, was not conclusive against her upon that question. The New York court entered upon the inquiry and found the fact that she was justified by her husband's acts in leaving his home and in acquiring a new domicil for herself, and that the Kentucky court therefore obtained no jurisdiction over her. It also found the facts necessary to warrant it in granting to her a divorce under the laws of New York, and it granted one accordingly. This I think the New York court had jurisdiction to do, and it did not thereby refuse the constitutional full faith to the Kentucky judgment.

That a husband can drive his wife from his home by conduct which entitles her to a divorce, and thus force her to find another domicil, and then commence proceedings in a court of his own domicil, for a divorce, which court obtains jurisdiction over her only by a service of process in the State of her new domicil, through the mail, and that on such service he can obtain a judgment of divorce which shall be conclusive against her in her action in the court of her own domicil, seems to me to be at war with sound principle and the adjudged cases. The doctrine of status, even as announced in the opinion of the court, does not reach the case of a husband by his misconduct rendering it necessary for the wife to leave him. I therefore dissent.

I am authorized to state that the CHIEF JUSTICE concurs in this dissent.

True copy.

Test:

Clerk Supreme Court, U. S.